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Supreme Court of the United States

October Term, 1973

No. 73-1025

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC. and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Petitioners,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation, LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

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POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC. and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Petitioners,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

Petitioners pray that a Writ of Certiorari be issued to review the judgment and decision of the Supreme Court of the State of Florida (the highest Court in which a decision could be had) which was entered in the above entitled case on July 31, 1973.

OPINIONS BELOW

The judgments of the Honorable James J. Kehoe, Judge of the Eleventh Judicial Circuit, in and for Dade County, Florida are not reported and are printed in the Appendix hereto. The opinion of the District Court of Appeal for the Third District of the State of Florida, printed in the Appendix hereto, is reported at 258 So.2d 322. The opinion of the Supreme Court of the State of Florida, printed in the Appendix hereto, is reported at 282 So.2d 628.

JURISDICTION

The judgment of the Supreme Court of the State of Florida was entered on July 31, 1973. Rehearing was denied on October 3, 1973.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3), which provides for review by this Court of final judgments or decrees rendered by the highest Court of a State where a title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

QUESTIONS PRESENTED

1. Does the State of Florida deny to the Petitioners their rights to due process of law and equal protection of the laws under Section 1 of the Fourteenth Amendment by denying Petitioners' timely demand for jury trial of factual issues in a law action, requiring Petitioners to have questions of fact that were common to an equitable issue tried non-jury, and then holding Petitioners to

be foreclosed from prosecuting the law action by the non-jury findings of fact.

2. Does the State of Florida, in denying a right to jury trial in an action at law, deprive a party of due process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

3. Where a party has an action at law, which is consolidated with an action in equity, and makes a timely demand for jury trial, does due process of law require that the common questions of fact be tried before a jury.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the Seventh and Fourteenth Amendments to the Constitution of the United States.

The Seventh Amendment to the Constitution of the United States provides:

> "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no facts tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides, in pertinent part, as follows:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT

The Petitioners were Plaintiffs in several consolidated actions in the lower Court which sought equitable and common law relief. (R. 147, 308, 371).

Petitioners made a timely demand for jury trial of all issues triable as of right by law. (R. 163, 359).

There were common issues of fact between the legal and equitable claims. The trial Court scheduled a jury trial (R. 169) but later determined to try the equitable claims first, and, after a non-jury trial of the equitable claims, held Petitioners to be bound by findings of fact therein, thereby precluding further prosecution of the legal claims.

Petitioners at all material times asserted their rights to a jury trial under the Seventh and Fourteenth Amendments to the Constitution of the United States and the Florida Constitution. This issue was preserved and argued to the Third District Court of Appeal for the State of Florida and to the Supreme Court of the State of Florida. All Courts in the State of Florida denied to Petitioners their right to a jury trial.

Petitioners, Plaintiffs below, will sometimes be referred to as the ASSOCIATIONS. Petitioners represent some 1,266 condominium apartments in the first major condominium complex to be established in Florida.

Respondents, Defendants below, shall be referred to as follows: POINT EAST MANAGEMENT CORPORATION shall be referred to as "MANAGER." Individual Defendants below (Case Nos. 69-11434 and 69-11436) shall be referred to either individually by their last names (SCHREIBER, PEARL, GESUNDHEIT or GORDON), or when discussed collectively as "INDIVIDUAL DEFENDANTS", the "DIRECTORS", or the "LESSORS", depending on their capacity in the particular context.

All of the issues in the consolidated appeal below arose out of three actions, containing nine counts, brought by the four Point East Condominium Associations (Petitioners) against the Respondents relating to identical Management Agreements and Recreational Leases (hereafter referred to in the singular) entered into with each Association at a time when the individual Respondents were the contracting parties on both side in various corporate and individual capacities.

The Petitioners brought three separate actions. The first (Case No. 69-11434) was against the MANAGER, and in four separate counts sought (1) cancellation and rescission of the Management Agreements for specific breaches; (2) alternatively, damages at law for specific breaches; (3) an accounting; and (4) a declaratory decree that the Management Agreement

was void as a matter of law because its specific provisions were contrary to public policy and contrary to the Florida Condominium Act.

The second action (Case No. 69-11435) was brought in two counts against SCHREIBER, PEARL, GESUNDHEIT and GORDON, individually, for fraud and for breach of their fiduciary duties while serving as Officers and Directors of the four Petitioners.

The third action (Case No. 69-11436) was brought in two counts against SCHREIBER, PEARL, GESUNDHEIT and GORDON in their capacity as Lessors of the Community Facilities Lease.

All of the actions involving nine counts were consolidated for discovery.

At the pretrial conference, after the consolidated cases had been set for jury trial as requested by the Petitioners, the Court directed that the six counts involving non-jury issues were to be tried first.

The three counts involving jury issues and seeking damages against the MANAGER and the individual Respondents were set for jury trial to take place two weeks after the non-jury trial. After the non-jury trial, these issues were removed from the trial calendar.

Subsequent to the entry of Final Judgment on the non-jury issues, the trial Court entered an Order of Dismissal with prejudice as to the three remaining counts upon which jury trial had originally been scheduled.

Two of the dismissed counts constituted Case No. 69-11435 and were actions at law against the individual directors for acts of commission or omission during the terms of their directorships. Count I sought damages for breach of their fiduciary relationships, and Count II sought compensatory and punitive damages for fraudulent misrepresentations by the directors with reference to their duties to the Petitioners to insure proper management.

In dismissing the two counts, along with a third count remaining from the separate action against the MANAGER (Case No. 69-11434), the trial Court stated:

> "The above styled consolidated litigation is before the Court upon motion of defendants to dismiss, or in the alternative to abate, the claim for damages alleged in Count II of the second amended complaint, as amended, in Case No. 69-11434 and the claims for damages alleged in Count I and Count II of the complaint in Case No. 69-11435. The Court has heard arguments of counsel and has considered the briefs submitted.
>
> *These* three civil *actions,* as consolidated, *consist of nine counts involving common questions of law and fact. Six* of the *counts* allege claims of *equitable* nature. The equitable remedies sought by plaintiffs are based on disaffirmance of the contractual relations between the parties. The remaining *three counts* allege claims for *damages,* and seek judgments for damages based upon affirmance of the

same contractual relations between the parties. Plaintiffs allege and rely upon the *same factual matters* for *equitable* relief and for recovery of *damages. All the issues involved in the six claims of an equitable nature were tried before the Court, and final judgment rendered thereon.*" (Emphasis Supplied).

The District Court affirmed the trial Court's dismissal of the damage counts because the trial Court's findings were presumed to be correct. 258 So.2d at 325.

The Petitioners by timely petition for rehearing and for clarification again asserted to the Court that an "affirmance of the trial Court's severance of the Counts on its own motion and subsequent trial of the non-jury issues first with a subsequent dismissal of the jury issues has effectively deprived the Plaintiff Associations of their Constitutional right to trial by jury under the Seventh Amendment to the Constitution of the United States. See, *Dairy Queen, Inc. v. Wood,* 369 U.S. 469 (1962) wherein the Supreme Court of the United States held that where there were common issues in both legal and equitable claims, '. . . the legal claims involved in the action *must be determined* prior to any final court determination of respondent's equitable claims.' *Id.* at 479." (See Appendix hereto).

The District Court denied the Petition for Rehearing. (See Appendix hereto).

By timely cross petition for certiorari, the Petitioners sought review in the Supreme Court of the State of Florida (See Appendix hereto) and asserted their rights under the Constitutions of the United States and

the State of Florida. The Supreme Court of Florida granted certiorari, heard arguments, and held that the issues raised by Petitioners were "without merit." 282 So.2d at 628. Petitioners timely Petition for Rehearing was denied (See Appendix hereto).

REASONS FOR GRANTING THE WRIT

1. If a state's action, whether under the authority of legislative or judicial interpretation, deprives an individual of a fundamental constitutional right, a Federal Court has the authority, and duty, to review such action. *Benton v. Maryland,* 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707; *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *Mapp v. Ohio,* 307 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081; *Shelley v. Kraemer,* 334 U.S. 1, 68 S.Ct.836, 92 L.Ed. 1161.

In *Shelley v. Kraemer, supra,* this Court held:

> "State action, as that phrase is understood for the purposes of the Fourteenth Amendment, refers to exertions of state power in all forms. And when the effect of that action is to deny rights subject to the protection of the Fourteenth Amendement, it is the obligation of this Court to enforce the constitutional commands. 334 U.S. at 20.
>
> * * *
>
> The rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights

established are personal rights . . . Equal protection of the laws is not achieved through indiscriminate imposition of inequalities.

. . . The Constitution confers upon no individual the right to demand action by the State which results in the denial of equal protection of the laws to other individuals. And it would appear beyond question that the power of the State to create and enforce property interests must be exercised within the boundaries defined by the Fourteenth Amendment." 334 U.S. at 22.

2. The State of Florida recognizes the right to jury trial in all common law actions.

Article I, Section 22 of the Constitution of the State of Florida provides:

> "The right of trial by jury shall be secure to all and remain inviolate. The qualifications and the number of jurors, not fewer than six, shall be fixed by law."

The procedure for asserting this fundamental and organic right is established by Rule 1,430, Florida Rules of Civil Procedure, which provides as follows:

> "(a) Right Preserved. The right of trial by jury as declared by the Constitution or by statute shall be preserved to the parties inviolate.
>
> (b) Demand. Any party may demand a trial by jury of any issue triable of right by a

jury by serving upon the other party a demand therefor in writing at any time after commencement of the action and not later than ten days after the service of the last pleading directed to such issue. The demand may be indorsed upon a pleading of the party.

(c) Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise, he is deemed to demand trial by jury for all issues so triable. If he has demanded trial by jury for only some of the issues, any other party may serve a demand for trial by jury of any other or all of the issues triable by jury ten days after service of the demand or such lesser time as the court may order.

(d) Waiver. The failure of a party to serve a demand as required by this rule shall constitute a waiver by him of trial by jury. If waived, a jury trial may not be granted without the consent of the parties. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

Petitioners made a timely demand for jury trial, and did not subsequently withdraw that demand.

The Supreme Court of the State of Florida has construed the Florida Constitution, and the Seventh Amendment to the Constitution of the United States, to require a jury trial of factual issues which are common to legal and equitable claims asserted by the

parties to a given controversy. In *Hightower v. Bigoney*, Fla., 1963, 156 So.2d 501, the Supreme Court of the State of Florida held that filing a compulsory counterclaim for relief cognizable at law in an action for equitable relief does not act as a waiver of the right to a jury trial. In so holding, the Court also held as follows:

> "Section 3, Declaration of Rights, Constitution of Florida, no less than the Seventh Amendment to the Federal Constitution, preserves the right to trial by jury and planted deep in American law the distinction between legal and equitable causes of action. All the attempts by rule or statute to merge law and equity have done no more than produce the liberal joinder, the compulsory counterclaim and their counterparts which, as in this case, have created some confusion. They have discarded the old common law forms of action that were in use when the writer was admitted to the bar and are lucidly discussed in "The Common Law"by Mr. Justice Holmes. Equity was designed to level the inequalities and rough places in the common law but it was never expected to take the place of the common law or such part of it as was guaranteed by the state and federal constitutions.
>
> Other cases could be cited in support of our thinking on the concept of trial by jury and its place in our jurisprudence. The cases we have cited show that it was at one time the right arm of common law but that it is now the dividing line that separates law from equity and that it is guaranteed by the state and

federal constitutions. It has had a long and distinguished history and is now one of the main avenues through which the common man directs the working of democracy. To hold that the mere discretion of a chancellor can set it at naught tends to agitate the butterflies in the stomach of an old common law lawyer who imbibed the common law from Coke, Blackstone, Holdsworth's History of English Law, Lord Campbell's Lives of the Chief Justices, and Mr. Justice Holmes' The Common Law." 156 So.2d at 509.

It is clear that when issues are sufficiently similar or related to the issues made by an equitable claim that a determination by the first fact finder would necessarily bind the later one, such issues may not be tried non-jury by the Court, since to do so would deprive the party of his constitutional right to trial by jury. See, for example, *Hightower v. Bigoney, supra; Adams v. Citizens Bank of Brevard*, Fla. App., 1971, 248 So.2d 682; *Sarasota-Manatee Airport Authority v. Alderman*, Fla. App., 1970, 238 So.2d 678.

3. The rationale and holding of the Florida Courts, as expressed above, is in accordance with that expressed by this Court in *Beacon Theaters, Inc. v. Westover*, 359 U.S. 500, 79 S.Ct. 948, 3 L.Ed.2d 988 (1959) and *Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 82 S.Ct. 894, 8 L.Ed.2d 44 (1962). In the *Dairy Queen* case, this Court held:

> "We conclude therefore that the district judge erred in refusing to grant petitioner's demand for a trial by jury on the factual issues related

> to the question of whether there has been a breach of contract. Since these issues are common with those upon which respondents' claim to equitable relief is based, *the legal claims* involved in the action *must be determined prior* to any final court determination of respondents' *equitable claims.*" (369 U.S. at 479; Emphasis Supplied).

4. The foregoing points show that the Petitioners were denied equal protection of the laws by the State of Florida, because the State of Florida had previously recognized the right to a jury trial in identical situations.

The denial of this right to a jury trial is not only a violation of Petitioners' rights to equal protection under the Fourteenth Amendment to the Constitution of the United States (in that the Courts of Florida have prior to this case consistently held that where there are common issues of fact between legal and equitable claims, a party litigant is entitled to have the common issues first submitted to a jury), but also a denial of Petitioners rights to due process of law under the Fourteenth Amendment to the Constitution of the United States.

5. In judging the sufficiency of State action in meeting the due process mandate in Section 1 of the Fourteenth Amendment, this Court has previously looked to the Bill of Rights. *Duncan v. State of Louisiana*, 391 U.S. 145, 194, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968).

In *Duncan v. State of Louisiana, supra*, this Court held that the right to a jury trial is a fundamental

principal of liberty and justice, recognized by the Sixth Amendment, and that a State is required by the due process clause of the Fourteenth Amendment to the Constitution of the United States to afford an accused such right "in all criminal cases which — were they to be tried in a federal court — would come within the Sixth Amendment guarantee." 391 U.S. at 149. In so holding, this Court stated:

> "The Fourteenth Amendment denies the States the power to 'deprive any person of life, liberty or property without due process of law.' In resolving conflicting claims concerning the meaning of this spacious language the Court has looked increasingly to the Bill of Rights for guidance; many of the rights guaranteed by the first eight Amendments to the Constitution have been held to be protected against state action by the Due Process Clause of the Fourteenth Amendment. That clause now protects the right to compensation for property taken by the State; the rights of speech, press and religion covered by the first Amendment; the Fourth Amendment rights to be free from unreasonable searches and seizures and to have excluded from criminal trials any evidence illegally seized; the right guaranteed by the Fifth Amendment to be free of compelled self-incrimination; and the Sixth Amendment rights to counsel, to a speedy and public trial, to confrontation of opposing witnesses, and to compulsory process for obtaining witnesses." 391 U.S. at 147.

The Seventh Amendment to the Constitution preserves the right to trial by jury in suits "at common

law, where the value in controversy shall exceed twenty dollars". Our forefathers recognized this right as a fundamental principal of liberty and justice. The right to a jury trial is so basic to our system of jurisprudence that due process of law cannot be had without it. *Duncan v. State, supra.*

There is no rational basis for distinguishing between rights in a civil action and rights in a criminal action. The mandate of the Fourteenth Amendment is that no State shall "deprive any person of life, liberty or property."

Property, and one's interests therein, has equal dignity, with one's right to life and liberty.

6. The record in this case shows that Petitioners were deprived of property without due process of law.

The Petitioners, in cases that had been originally consolidated for trial, timely demanded trial by jury. The trial Court, on its own Motion, determined that the non-jury issues were to be tried first, and then ruled that because they had been tried first, the facts determined therein by the Court as the trier of the facts precluded the submission to a jury of different issues upon the "same factual matters".

The denial of this fundamental right was affirmed by the highest Court in the State of Florida.

The effect of the holding on this Record was to deprive the Petitioners of any right to trial by jury against their former officers and directors, the INDIVIDUAL DEFENDANTS for breach for their fiduci-

ary relationship to the Petitioners merely because the Petitioners had been required by the trial Court to first proceed against the Defendant MANAGER (a separate corporate entity) on the issue of equitable cancellation.

In other words, since the Petitioners had sued the MANAGER in equity for cancellation of the management contracts based upon specific breaches, they could not sue their former officers and directors, the individual Defendants *who were not parties to that issue*, for damages arising out of the breach of their fiduciary duties to the Petitioners. In denying cancellation, the trial Court specifically stated and the Florida Courts affirmed that:

> "The plaintiffs [Petitioners], *while under control of the individual defendants herein*, were authorized and empowered to waive the matters of which plaintiffs now complain . . ." (R 1408, Emphasis Supplied).

This is a wrong without a remedy, since it allows the officers and directors of a corporation to wrongfully and knowingly permit breaches of contract adverse to the interest of the corporation's members or stockholders, but to remain insulated from liability to the members or stockholders themselves because the officers and directors were "empowered" to waive the breaches.

Paradoxically, the Petitioners in this case are on the one hand precluded from redress against the MANAGER because of the improper and fraudulently concealed acts of their officers and directors, and are on the other hand precluded from redress against said

officers individually *because* of the same acts. The obvious fallacy in this seeming paradox is the failure of the Court to recognize the difference in the identity of the parties in the different causes of action involved.

The only legal entity as to which any judgment was rendered on the merits at the non-jury trial pertaining to management and operation of the condominium project was the MANAGER, a separate corporation. The actions for damages for deceit against the INDIVIDUAL DEFENDANTS as officers and directors (for which trial by jury had been demanded) had been severed by the trial Court and were not before the Court. Therefore, these separate issues, in a separate action, were never tried.

7. As shown in Article I, Section 22, of the Constitution of the State of Florida, the right to trial by jury is preserved to a party in the State Courts of Florida.

The right to a jury trial under the Seventh Amendment is recognized by this Court, and the Courts of the State of Florida, as fundamental and necessary to assure due process of law.

Not only were Petitioners denied this right, but the denial in this case was an arbitrary and capricious discrimination because the State Courts of Florida have traditionally recognized that parties in Petitioners' position have a right to a trial by jury of those questions of fact which are common to issues of law and equity.

The Courts of the State of Florida denied this fundamental constitutional right to the Petitioners, and in so doing, violated Petitioners' rights to due

process of law and equal protection of the laws under the Fourteenth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 69-11434

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

CASE NO. 69-11436

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Plaintiffs,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT and SIDNEY GORDON,

Defendants.

FINAL JUDGMENT

This is a consolidated action brought by four (4) Condominium Associations, organized pursuant to Chapter 711, Florida Statutes, representing the unit residents of the condominium complex known as POINT EAST, against POINT EAST MANAGEMENT CORPORATION and LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT and SIDNEY GORDON, individually.

Case No's 69-11434, 69-11435 and 69-11436 including nine (9) counts, were consolidated for purposes of trial. Counts 1 and 11 of Case No. 69-11435 and Count II of Case No 69-11434 involving issues of trial by jury were severed, and the remaining six (6) counts were tried before the Court without a jury.

The Court having heard, reviewed, and considered the testimony, evidence, arguments of counsel, and Memoranda of Law, makes the following findings of fact and conclusions of law:

COUNT ONE-CASE NO. 69-11434

The plaintiffs seek a Declaratory Decree as to paragraph 19 of the Community Facility Lease which states:

> "This Lessee and every present and future Lessee agree that such managing agent shall be POINT EAST MANAGEMENT CORPORATION, a Florida corporation, provided that such managing agent may at any time be

changed upon the agreement of Lessees of the demised premises then bearing fifty-one percent (51%) or more of the cost and expense of the program conducted upon Parcel B."

Plaintiffs allege that they had notified the defendant Management Corporation on March 24, 1969, that the requisite fifty-one percent (51%) vote had been taken, and that defendant's appointment as managing agent had been terminated and a new managing agent had been appointed.

Plaintiffs further allege that defendant had refused to terminate its management over Parcel B. Defendant in its refusal to terminate its management relies upon paragraph 4.13 of the Management Agreements which appoints the defendant as the Manager of Parcel B, and the fact that the Management Agreements themselves are for a period of nearly twenty-five (25) years. In turn, plaintiffs rely upon paragraph 3.3 of the four Declarations of Condominium which paragraph provides that in the event of a conflict between the Community Facility Lease and the Declaration, the provisions of the Community Facility Lease shall control, and on paragraph 12 of the By-Laws of each Association which paragraph provides that in a conflict between the Management Agreement, the Community Facility Lease and the By-Laws, the Community Facility Lease shall control.

Plaintiffs further allege that they are in doubt as to their rights under the provisions of the Management Agreements and the Community Facility Leases, and that a controversy has arisen between the parties as to plaintiffs' right to terminate defendant's appointment

as managing agent over Parcel B. Plaintiffs seek a Declaratory Decree, an injunction against defendant's management of Parcel B, and an accounting since March 24, 1969.

Upon plaintiffs' Motion for Summary Judgment, the Court denied the Motion, finding that there was a possible ambiguity in the applicable documents, and that defendant should have the right to present parol testimony bearing on the question of whether there was an ambiguity.

The Court having taken testimony and having considered said testimony and the applicable documents, finds that paragraph 19 of the Community Facilities Leases is clear and unambiguous and that in accordance with the provisions of that paragraph, the managing agent at POINT EAST may at any time be changed upon the requisite vote of the Lessees. With regard to the vote taken prior to the time of the Decree, however, it is the ruling of the Court that declaratory relief prior to the date of the filing of the action is not applicable and that an accounting will not lie.

Accordingly, it is ORDERED AND ADJUDGED that as to the issues presented under Count I of the Second Amended Complaint in Case No. 69-11434, Final Judgment is hereby entered in favor of the plaintiffs and against the defendant, and it is the judgment of the Court that the managing agent as to Parcel B at POINT EAST may at any time be changed upon agreement of the Lessees then bearing fifty-one percent (51%) or more of the cost and expense of the program conducted upon Parcel B.

COUNT THREE-CASE NO. 69-11434

By this Count, as amended, plaintiffs seek cancellation of the Management Agreements made by and between the parties for alleged breaches thereof and defaults committed by defendant. Plaintiffs also pray for injunctive relief, an accounting, damages, and for appointment of a receiver.

The Court finds for the defendant and against plaintiffs on the claims involved in this Count. Plaintiffs have failed to prove their allegations and the equities are with the defendant. The plaintiffs, while under the control of the individual defendants herein, were authorized and empowered to waive the matters of which plaintiffs now complain, and the breaches or defaults claimed to have occurred prior to January 21, 1969, were duly waived. The breaches or defaults asserted to be continuing in nature are wholly insufficient to justify cancellation of the Management Agreement governing defaults of the defendant were not complied with by the plaintiffs.

Accordingly, it is ORDERED AND ADJUDGED that, as to the issues presented under Count III of the Second Amended Complaint, as amended, in Case No. 69-11434, Final Judgment is hereby entered in favor of the defendant and against the plaintiffs, and that plaintiffs take nothing by said cause of action.

COUNT FOUR-CASE NO. 69-11434

Count IV of plaintiffs' Second Amended Complaint, as amended, alleges that various expenditures

made by defendant from assessments collected from members of the Condominium Associations were improperly made and constituted misuse of such funds and breach of the Management Agreement. Plaintiffs pray for a judgment requiring defendant to account for such misused and misappropriated funds.

The Court finds for the defendant and against plaintiffs on the claims involved in this Count. The evidence establishes no misuse, misappropriation or improper expenditure of any funds by the defendant. All the disputed items either have been paid by the defendant or constitute proper maintenance or management charges and the utilization of assessments for such purposes does not constitute any breach or violation of the Management Agreement. This decision shall not effect any right which individual condominium owners may have concerning the four-months' deposit paid at the time of closing to the condominium developer, but shall be binding only upon the plaintiffs as to the matters set forth in said Count.

Accordingly, it is ORDERED AND ADJUDGED that, as to the issues presented under Count IV of the Second Amended Complaint, as amended, in Case No. 69-11434, Final Judgment is hereby entered in favor of the defendant and against the plaintiffs, and that plaintiffs take nothing by said cause of action.

COUNT FIVE-CASE NO. 69-11434

Count V seeks a Declaratory Judgment declaring that the Management Agreements between the four (4) Condominium Associations and the POINT EAST

MANAGEMENT CORPORATION each Agreement remaining in force under its terms until December 21, 1990, are illegal and void as being contrary to the provisions of the Condominium Act, Chapter 711, Florida Statutes, and contrary to public policy.

The Court finds for the plaintiffs and against the defendant on the issues involved in this Count. The Condominium Act clearly requires control of the administration and management of a Condominium Association to remain with the Condominium Association itself. Under the Act the Association is specifically designated as being the entity responsible for the operation of a condominium which is further defined to mean and include "administration and management of the condominium property." Section 711.12(1), 711.03(12), Florida Statutes.

The Management Agreements in this case, considered in light of their specific provisions and the length of their terms, completely and effectively delegate and abdicate the responsibility and control of the plaintiff Condominium Associations to the defendant. This delegation and abdication of responsibility and control exceeds the bounds of statutory authority and defeats the purposes of the Condominium Act.

While these Management Agreements are not contrary to public policy, they are clearly in violation of the intent, purposes, and authority of the Condominium Act and are, therefore, unlawful and void.

Accordingly, it is ORDERED AND ADJUDGED that as to the issues presented under Count V of the Second Amended Complaint in Case No. 69-11434,

Final Judgment is hereby entered in favor of the plaintiffs and against the defendant, and the Management Agreements are hereby declared to be void.

COUNT ONE-CASE NO. 69-11436

By this Count, plaintiffs pray for a Declaratory Judgment adjudicating the respective rights and duties of the parties under the Community Facilities Leases governing the use of the recreation facilities and the health center owned by defendants and leased to the plaintiffs. Plaintiffs contend the Community Facility Leases are null and void because they are contrary to law, Chapter 711, Florida Statutes, and contrary to public policy. The validity thereof is challenged on the ground that they fail to contain a graphic description of the improvements, and that they do not show in sufficient detail the common elements and their relative locations and approximate dimensions. It is further challenged on the grounds that the leases do not include a plot plan, map, survey, building plan, floor plan or certificate of an architect, engineer or surveyor, and that there is not sufficient information with which to determine the identification, location, dimensions and size of the common elements and each of the units as required by Section 711.08(1)(e), Florida Statutes.

Plaintiffs claim this effectively deprived plaintiffs and their members from making a determination of the reasonableness of the rent, the adequacy of the facilities to meet the needs of the members of the Condominium Associations, and the soundness of the construction of the facilities. Plaintiffs allege they demanded that the leases and the obligation to pay rent be terminated or re-negotiated. Defendants claim that plaintiffs and their respective members had actual knowledge of the recreational and health facilities described in the Community Facility Leases and that they are estopped from

maintaining this claim. Defendants contend for the validity of such leases.

The Court finds for defendants and against the plaintiffs on the claims involved in this Count. The evidence establishes that the Community Facility Leases are valid and binding by virtue of estoppel; that the defendants made full disclosure concerning the facilities described therein, and that the plaintiffs and their respective members had appropriate knowledge and information concerning the facilities at the times of purchase of the condominium units, and the Community Facility Leases were duly ratified and confirmed.

The matter of the existence of an easement to provide street access to the condominium complex from Biscayne Boulevard was duly resolved by stipulation of the parties made in the record at the commencement of the trial, and this does not present an issue for adjudication. Such stipulation of the parties is confirmed and approved.

Accordingly, it is ORDERED AND ADJUDGED that, as to the pending issues presented under Count I of the Complaint in Case No. 69-11436, Final Judgment is hereby entered in favor of the defendants and against the plaintiffs, and that plaintiffs take nothing by said cause of action.

COUNT TWO-CASE NO. 69-11436

By this Count the plaintiffs seek a Declaratory Decree as to whether they had or have the right to sublet a portion of the Condominium Recreational Area known as Parcel B, a building that housed medical facilities.

The Community Facility Lease, under which the Parcel B. was leased by the Associations from the Lessors, restricts the use of Parcel B to certain organized health programs enumerated in the Leases. Plaintiffs alleged that they desired to sublet or have the managing agent sublet offices in Parcel B, consistent with the restrictive covenants of the Lease, to physicians at a reasonable rent payable to the Lessees in order to defray the cost of the lease rent payable to the Lessor, but that the Lessor had refused to recognize the plaintiffs' right to sublet.

The Court finds that plaintiffs have stated a valid cause of action for a Declaratory Decree of their right to sublet the premises. The Court further finds that the Lease contains no prohibition against subletting the premises, and that the Lessees do have the right to sublease the premises and charge rent to any sublessees, provided that any such sublease is made subject to the restrictive covenants of paragraph 4.5 of the Community Facilities Lease.

Accordingly, it is ORDERED AND ADJUDGED that as to the issues presented under Count II of Case No. 69-11436, Final Judgment is hereby entered in favor of the plaintiffs and against the defendants, and it is the judgment of the Court that the Lessees may sublet the facilities located on Parcel B, and may charge and collect rent from such sublessees, provided that such sublease is made subject to the restrictive covenants of the Community Facility Leases.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 5th day of June, 1970.

/s/ JAMES W. KEHOE
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Concolidated Cases Nos. 69-11434, 69-11435 and 69-11436

(Judge James W. Kehoe)

Case No. 69-11434

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant

Case No. 69-11435

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

LEONARD SCHREIBER, et al.,

Defendants.

Case No. 69-11436

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

LEONARD SCHREIBER, et al.,

Defendants.

ORDER OF DISMISSAL

The above styled consolidated litigation is before the Court upon motion of defendants to dismiss, or in the alternative to abate, the claim for damages alleged in Count II of the second amended complaint, as amended, in Case No. 69-11434 and the claims for damages alleged in Count I and Count II of the complaint in Case No. 69-11435. The Court has heard arguments of counsel and has considered the briefs submitted.

These three civil actions, as consolidated consist of nine counts involving common questions of law and fact. Six of the counts allege claims of equitable nature. The equitable remedies sought by plaintiffs are based on disaffirmance of the contractual relations between the parties. The remaining three counts allege claims for damages, and seek judgments for damages based upon affirmance of the same contractual relations between the parties. Plaintiffs allege and rely upon the same factual matters for equitable relief and for recovery of damages. All the issues involved in the

six claims of an equitable nature were tired before the Court, and final judgment rendered thereon. Defendants' motion is addressed to the three remaining claims for damages. Plaintiffs thereafter filed a notice for trial of these damage claims, and defendants moved to strike the notice for trial. The Court so finding, and being duly advised in the premises, it is thereupon

ORDERED AND ADJUDGED that defendants' motion to dismiss is hereby granted, and that the claims for damages set forth in Count II of the second amended complaint, as amended, in Case No. 69-11434, and in Count I and Count II of the complaint in case No. 69-11435, be and the same are hereby dismissed, with prejudice.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 16 day of September, 1970.

JAMES W. KEHOE
CIRCUIT JUDGE.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DISPOSED OF.
'72 FEB. 9 AM 8:34

IN THE DISTRICT COURT OF APPEAL OF FLORIDA THIRD DISTRICT

JANUARY TERM, A.D. 1972

CASE NO. 70-938

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Appellant,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Appellees.

CASE NOS. 70-948
70-1043

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Appellants,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Appellees.

CASE NO. 70-949

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Appellants,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT and SIDNEY GORDON,

Appellees.

Opinion filed February 8, 1972.

Appeals from the Circuit Court for Dade County, James W. Kehoe, Judge.

McCarthy, Steel, Hector & Davis, for Point East Management Corp. and Schreiber, Pearl, Gesundheit and Gordon.

Frates, Floyd, Pearson & Stewart and Gerald F. Richman, for Point East One Condominium Corp.

Before SWANN, C.J., and CHARLES CARROLL and HENDRY, JJ.

PER CURIAM.

These appeals grew out of three actions which were consolidated in the trial court, and upon which a single judgment was entered. The individual defendants owned certain property upon which they created or

developed a condominium complex, for which four separate declarations of condominium were made, resulting in the formation of four condominium associations, each covering a certain number of the buildings involved and the land upon which such buildings were situated.

Prior to sale of the condominiun housing units to the respective purchasers thereof, and while the developers owned and controlled the associations and also a corporation which had been formed to act as a management corporation therefor, they caused long term contracts to be made between the associations and the management corporation for the management of the former by the latter. Also, the individuals as the owners of certain adjacent land made a 99-year lease thereof to the associations for use as a common element for facilities (auditorium, recreational, etc.).

In one action the associations sued the management corporation seeking cancellation of the management contracts because of alleged breaches of contract; damages for breach of contract; an accounting; and a determination that the management contracts were void because against public policy and for failure to conform to the requirements for such contracts as provided for in the Condominium Act (Chapter 711 Fla.Stat., F.S.A.).

In a second action the associations sued the four individual developers seeking damages for alleged fraud and breach of fiduciary duties. The third action was by the associations against the four individual defendants, for cancellation of the above mentioned lease, of which said defendants were the lessors.

Upon final hearing the trial court rejected the claims of the plaintiffs for an accounting from the management corporation and for rescission of the management contracts for breach of contract, but held that the management contracts were invalid on the ground that they failed to comply with certain material statutory requirements therefor and contained provisions contrary to the direction and intent of the statute. The trial court dismissed the counts by which the plaintiffs sought damages against the individual defendants, and denied the claim of the plaintiffs for cancellation of the above mentioned lease.

The appeal filed by the defendants challenges the ruling of the trial court invalidating the management contracts. The appeals by the plaintiffs seek reversal of the provisions of the judgment by which the court refused to require an accounting by the management corporation, denied the claims for damages, and denied the prayer for rescission of the lease.

In holding the four similar management contracts were invalid, the trial court stated:

"The Condominium Act clearly requires control of the Administration and management of a Condominium Association to remain with the Condominium Association itself. Under the Act the Association is specifically designated as being the entity responsible for the operation of a condominium which is further defined to mean and include 'administration and management of the condominium property.' Section 711.12(1), 711.03(12), Florida Statutes.

"The Management Agreements in this case, considered in light of their specific provisions and the

length of their terms, completely and effectively delegate and abdicate the responsibility and control of the plaintiff, Condominium Associations to the defendant. This delegation and abdication of responsibility and control exceeds the bound of statutory authority and defeats the purposes of the Condominium Act.

"While these Management Agreements are not contrary to public policy, they are clearly in violation of the intent, purposes, and authority of the Condominium Act and are, therefore, unlawful and void."

We hold that the appeal of the defendants from the judgment of the trial court invalidating the four management contracts is without merit, and the judgment is affirmed in that regard.

In §711.03 Fla.Stat., F.S.A., dealing with definitions, subsection (2) provides: "Association means the entity responsible for the operation of a condominium." Subsection (12) states: "Operation, or operation of the condominium, means and includes the administration and management of the condominium property."

Section 711.12 contains a number of paragraphs dealing with "The association." Subsection (1) thereof provides: "The operation of the condominium shall be by the association, the name of which shall be stated in the declaration." Upon inspection of the management contracts involved here we agree with the conclusion reached by the trial court that the controls and management which the statute provided should be in the condominium associations were divested from them by said contracts. The brief of the appellant

enumerates features of control and management which thus were placed beyond the grasp of the associations, and which revealed the practical (monetary) losses occasioned thereby to the unit owners, as well as the legally improper results which flowed therefrom. While those matters serve to emphasize the correctness of the ruling of the trial court relating to the management contracts, we observe no need to detail them since we are of the view, as was the trial court, that a contract made or caused to be made by the original owners or developers of a condominium between the condominium association and a manager or management corporation, which operates to divest from the association in a material or substantial degree the power and privilege granted it by the statute to operate the condominium, is invalid, and not binding upon the association as subsequently owned and officered by those who purchase units therein.

The determinative question ruled on by the trial court here, and which formed the basis of the decision as to invalidity of the management contracts in this case, was not directly considered or passed upon in earlier cases cited and relied on by the appellees, Fountainview Association, Inc. v. Bell, Fla.App.1967, 203 So.2d 657 (cert.discharged, 214 So.2d 609); and Riviera Condominium Apartments v. Weinberger, Fla.App.1970, 231 So.2d 850.

In denying the claim of the plaintiffs for accounting by the defendant management corporation, the judgment stated:

"The Court finds for the defendant and against plaintiffs on the claims involved in this Count. The

evidence establishes no misuse, misappropriation or improper expenditure of any funds by the defendant. All the disputed items either have been paid by the defendant or constitute proper maintenance or management charges and the utilization of assessments for such purposes does not constitute any breach or violation of the Management Agreement. This decision shall not affect any right which individual condominium owners may have concerning the four-months' deposit paid at the time of closing to the condominium developer, but shall be binding only upon the plaintiffs as to the matters set forth in said Count."

The plaintiff-appellants contend the ruling of the trial court that basis for ordering an accounting was not shown, was contrary to the weight of the evidence. With that contention we cannot agree. The trial court was the trier of the facts. The ruling was made upon consideration of the evidence relating to the subject, and the findings of the trial court in that regard are not without support in the evidence. The decision of the court thereon carries a presumption of its correctness, particularly when so based. We affirm that ruling of the trial court. On a similar basis we affirm the holding of the trial court which denied the relief sought by the plaintiffs in the form of damages against the individual defendants.

Regarding the lease or leases made by the developers to the associations, it is to be noted that under §711.03 Fla.Stat., F.S.A., dealing with definitions, subsection (4) provides: "Common elements mean the portions of the condominium property not included in the units." Section 711.121 permits a condominium association to enter into leases for lands

for various recreational facilities "whether or not contiguous to the lands of the condominium, intended to provide for the enjoyment, rexreation or other use or benefit of the unit owners." In dealing with the question of the validity of the above described lease of property and facilities to be used as a common element of the condominium associations, the judgment of the trial court outlined the grounds upon which the plaintiffs contended the lease should be declared invalid, and in rejecting the relief sought, stated:

"The Court finds for defendants and against the plaintiffs on the claims involved in this Count. The evidence establishes that the Community Facility Leases are valid and binding by virtue of estoppel; that the defendants made full disclosure concerning the facilities described therein, and that the plaintiffs and their respective members had appropriate knowledge and information concerning the facilities at the times of purchase of the condominium units, and the Community Facility Leases were duly ratified and confirmed."

While the lease in question contains provisions which appear to be of a kind that might be expected to motivate a court of equity to grant relief therefrom to the associations upon which the lease was thus imposed, we affirm the ruling of the trial court with relation to the lease, on the grounds stated in the judgment as above quoted. See Wechsler v. Goldman, Fla.App.1968, 214 So.2d 741.

For the reasons stated the judgment is affirmed.

C. J. Swann — concurring specially

I concur in the affirmance of the ruling of the trial judge that these specific management agreements "considered in light of their specific provisions and the length of their terms" are unlawful and void. My concurrence is based on the terms of these specific agreements and the actions and results which they generated.

I would not, and this opinion does not, hold that all management contracts entered into by condominium associations are unlawful or void.

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING PETITION AND, IF FILED, DETERMINED.

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973

CASE NO. 42,228

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Petitioner, Cross/Respondent,

v.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., a Florida nonprofit corporation, et al.,

Respondents, Cross/Petitioners,

Opinion filed July 31, 1973

Petition and Cross-Petition for Writs of Certiorari to the District Court of Appeal, Third District

Darrey A. Davis of McCarthy, Steel, Hector & Davis, for Petitioner, Cross-Respondent

Ray H. Pearson, Gerald F. Richman and Bertha Claire Lee of Frates, Floyd, Pearson, Stewart, Preenza & Richman, for Respondents, Cross-Petitioners

ADKINS, J.

By petition and cross-petition for writ of certiorari, we have for review a decision of the District Court of Appeal, Third District (258 So.2d 322), which allegedly conflicts with a prior decision of this Court (*Lake Mabel Development Corporation v. Bird*, 99 Fla. 253, 126 So. 356 (1930) on the same point of law. We have determined that we have jurisdiction pursuant to *Fla. Const.*, art. V, §3(b) (3), F.S.A.

Petitioner is the original developers of the Point East condominium project, a management corporation contracted to manage the project for a period of 25 years, and lessors of a recreation facility to the condominium association on a 99-year lease. The various identities of petitioner simply represent different stages of the developers' involvement with the project. Petitioner developed the condominium project and, subsequent to the formation of the condominium associations, contracted with itself for management of the condominiums and for the lease.

Respondents are the condominium associations — as presently constituted by individual condominium unit owners — who brought suit for rescission of the lease and management contract, for damages in fraud, for damages for breach of a fiduciary duty, and for damages for breach of contract. All relief sought was denied by the trial court except for invalidation of the management contract, and the District Court of Appeal, Third District, affirmed.

Petitioner seeks a reversal of the District Court of Appeal on the invalidation of the management contract, and respondents, by cross-petition, seek reversals of the District Court of Appeal on the affirmance of all other holdings of the trial court.

We have carefully reviewed those issues raised by the cross-petition and find them to be without merit. However, we have determined that the point raised by petitioner is meritorious, and the District Court of Appeal must be reversed on its invalidation of the management contract.

The District Court of Appeal recognized that rescission of the management contract would not lie merely because it arose from the dealings of the developers with themselves while they constituted all of the members of the condominium associations and of the management corporation. *Lake Mabel Development Corporation v. Bird, supra.*

However, the District Court of Appeal held that the 25-year management contract is void because it violates the provisions of the Condominium Act in wresting the control of the management of the condominiums away from the associations. This interpretation is based on three sections of the Condominium Act.

First, *Fla. Stat.* §711.03(2), F.S.A., defines the association as "the entity responsible for the operation of a condominium." *Fla. Stat.* §711.03(12), F.S.A., then defines operation of the condominium as including "the administration and management" of the property. Finally, the District Court of Appeal relies upon *Fla. Stat.* §711.12(1), F.S.A., which provides:

> "The operation of the condominium shall be by the association, the name of which shall be stated in the declaration."

The District Court of Appeal then, in effect, rescinded the contracts complained of, holding them to be invalid because they

> "[D]ivest from the association in a material or substantial degree the power and privilege granted it by the statute to operate the condominium . . . "*Point East Management Corporation v. Point East One Condominium Corporation*, 528 So.2d 322, p. 325.

We cannot agree with the District Court of Appeal that the Legislature, by placing in the condominium associations the power and duty to manage the condominium properties, intended to restrict the ability of the associations to contract for the management of the associations. The fact that the contract is of long duration does not make the contract any more objectionable, and as pointed out in *Lake Mabel Development Corporation v. Bird, supra*, the fact that the developers of the condominiums contracted with themselves for the management contract does not invalidate it.

The Legislature has chosen, through the adoption of *Fla. Stat.* §711.13(4), F.S.A., which became effective January 1, 1971, to allow the owners of condominium units to cancel initial management contracts by a vote of 75 per cent of the owners of the individual units. Accordingly, it must be assumed that the Legislature recognized the existence of and chose not to abolish such contracts. It is impossible, therefore, to discover a legislative prohibition against a management contract.

The fact of the contract and its terms were made known — or at least available — to all who bought or considered buying condominium units, and the contracts of sale included affirmation of the management contract. Admittedly, a prospective purchaser had no option as to the management contract, but he knew or should have known that the contract was part of the purchase price of his condominium unit. Considered in that light, enforcement of the contract cannot be said to work a hardship on the present condominium owners.

Accordingly, that portion of the decision of the District Court of Appeal, Third District, which sought to invalidate the management contract between petitioner and respondents is quashed, and the remainder of the decision is approved. The cause is remanded to the District Court of Appeal, Third District, for further proceedings not inconsistent herewith.

It is so ordered.

CARLTON, C. J., McCAIN and DEKLE, JJ., and MAGER, District Court Judge, concur

ERVIN, J., dissents with opinion

BOYD, J., dissents and agrees with ERVIN, J.

ERVIN, J., dissenting:

We are clearly without jurisdiction to decide the merits of petitioner's cause under Article V, Section 3(b) (3), Florida Constitution. The decision under review does not conflict with Lake Mabel Development Corporation v. Bird, 99 Fla. 253, 126 So. 356 (1930), and

the writ of certiorari should now be discharged as having been improvidently issued.

Lake Mabel involved a defense raised in mortgage foreclosure proceedings brought by one of the original promoters against the corporation. The corporation sought to avoid the foreclosure by arguing that the promoters had made a substantial profit on the sale of the mortgaged lands in which they owned all of the outstanding stock.

> After specifically noting that "there is no averment in the pleadings or showing made by the record that any stock was ever issued or sold by the corporation to the public,"

this Court stated:

> "A corporation cannot, while its proprietors own all its outstanding stock, avoid in equity a purchase of property sold to it by its promoters at a large profit, represented by stock of the corporation issued to such promoters, since the corporation thus has full knowledge of the facts and the rights of innocent purchasers of stock have not arisen." Id. at 358. (Emphasis supplied.)

Note my dissenting opinion in Fountainview Association, Inc. #4 v. Bell, 214 So.2d 609 (Fla.1968), at 611.

The principles espoused in the 1930 *Lake Mabel* decision were never discussed by the District Court of Appeal below. Indeed, it is unlikely that the court gave any consideration to applying that decision to the cause

presently under review for two reasons: 1) Unlike *Lake Mabel*, the instant case involves condominium association corporations that by their very nature are intended to be composed of members of the general public. 2) The Condominium Act was passed thirty-three years after the *Lake Mabel* decision, and was expressly designed by our Legislature "to give statutory recognition to the condominium form of ownership of real property." Section 711.02, F.S. In the case sub judice the District Court of Appeal rested its decision almost exclusively upon an interpretation of the provisions of that act. The *Lake Mabel* decision is wholly irrelevant and the citing of it for conflict is a legal non sequitur.

Having mistakenly reached the merits of petitioner's claim, the majority have proceeded to misconstrue the Condominium Act (Chapter 711, F.S.). The four similar management contracts between the condominium associations and the management corporation, which the trial court and the District Court of Appeal, Third District, have found to be invalid, contain provisions inimical to Sections 711.03(2), 711.03(12), and 711.12(1), F.S.

As is stated in the majority opinion, the petitioner, as developer of the condominium, contracted with itself for management of the condominium and for the lease. Thus, the management contracts were executed by the developers while they controlled the condominium associations prior to their present makeup of individual condominium apartment owners. The resulting lopsided character of these "agreements" are best evidence by an examination of the provisions contained therein. The contracts extend for periods of up to twenty-five years with no right of termination by the condominium

associations except for cause after sixty days notice of default. The manager [petitioner], "to the exclusion of all persons including the Association [respondent] and its members [presently, the apartment owners]" is given, *in part*, the following powers:

1) The right to hire, supervise, and fire, "*in its absolute* discretion" such persons as are required to fulfill its duties under the management agreement.

2) The power to collect *all assessments* from the associations' members and to take such action in the name of the associations as is needed to collect payment—to include "foreclosing the association's lien therefore, or by way of other legal process as may be required. . . ."

3) The power to carry on "normal" maintenance and repair work except that no one item of repair is to exceed *$30,000.00* unless authorized by the associations.

4) The right to purchase "equipment, tools, vehicles, appliances," etc., as are "reasonably necessary" to perform its duties.

5) The right to maintain all books and records subject only to the right of the associations to conduct an independent audit at their own expense.

6) The right to deposit funds collected from the associations either in a special bank account or to commingle the monies with similar funds "as the Manager shall determine."

7) The right to "retain and employ attorneys-at-law, tax consultants, certified public accountants, health consultants and such other experts and professionals whose services the Manager may reasonably require. . . ." (The result of this provision is that the apartment owners are paying the costs sustained by both parties in the present suit.)

8) The power to insure that payments received from assessments or other revenue are sufficient to pay the costs of all services and to adequately fund reserves. Failure of the associations to increase the monthly assessments as requested by the manager "within a reasonable time may, at the option of the manager, be construed as a breach of this agreement."

The above provisions are only a sampling of the terms of the "Management Agreement" that was before the trial court together with voluminous testimony attesting to the impotency of the associations to have the benefits and to function autonomously under the Condominium Act when saddled by the terms of what amount to adhesion contracts together with details of the resultant excessive and overreaching extractions mulched from the unit owners. These provisions led the trial court to conclude:

> "The Management Agreements in this case, considered in light of their specific provisions and the length of their terms, completely and effectively delegate and abdicate the Associations to the defendant. This delegation and abdication of responsibility and control exceeds the bounds of statutory authority and defeats the purposes of the Condominium

Act." Point East Management Corp. v. Point East One Condominium Corp., 258 So.2d 322 (Fla.App. 1972), at 324.

Section 711.03(2), F.S., defines the association as "the entity responsible for the operation of a condominium" and Section 711.03(12) defines operation of a condominium as including "the administration and management of the property." The unmistakable intent of the Legislature as reflected in that language is further reenforced by the following statement appearing further in the Condominium Act: "The operation of the condominium shall be by the association, the name of which shall be stated in the declaration." Section 711.12(1), F.S.

This language does not mean that the associations cannot enter into management contracts so long as they are ultimately responsible as a self-autonomous group for the administration of the property and maintain supervision and control over the managing party. The long duration of the contracts herein makes them statutorily objectionable because it serves to undercut the legislative mandate of autonomy for the unit owners. That problem is further compounded in the present case because the associations (i.e., the developers) were of an entirely different composition when the contracts were negotiated. As is stated in petitioner's brief and may be taken as an admission against interest:

> "At the time the Management Agreements and the Community Facilities Lease were made, no interests of any purchasers or other third parties were involved. No apartment

> units had been sold. The developer . . . was the sole owner of all apartment units and the entire condominium property, and *the developer was the only member of the associations.* No interests of anyone other than the developer were in anywise affected by the Management Agreements and the Community Facilities Leases."

Petitioner then asserts, as does the majority, that no harm resulted from this blatant attempt to circumvent the intent and mandate of the Condominium Act because "the apartments were sold and purchased with full disclosure and complete knowledge of the contents of the Management Agreements and Community Facilities Leases. . . ." Such rationalization not only ignores the statutory provision for association autonomy, but completely ignores the reality of unequal bargaining positions between individual apartment purchasers and a multi-million dollar corporation intent on foisting long-term management contracts of adhesion upon them, contrary to regulatory law.

The fact that the Legislature has more recently taken further steps to insure that such unconscionable contracts can be terminated by a vote of seventy-five per cent of the apartment unit owners does not have the secondary effect of rendering Respondents remediless in this litigation because the subject contracts were entered into prior to the effective date of that legislation. See Section 711.13(4), F.S. The fact that the Legislature became more acutely aware of this problem and further acted three years ago to bolster remedies against future injustice, does not mean that the courts are powerless to strike down an illegal contract that is

clearly violative of other provisions of Chapter 711, F.S., in effect at the time the contracts were signed.

Having accepted jurisdiction in this cause, the majority would do better to focus their attention on Respondent's cross-petition as it pertains to its original suit brought against the management corporation seeking damages in excess of $500,000 for fraud, breach of a fiduciary duty, and breach of contract. In affirming the trial court's refusal to grant the associations an accounting by the management corporation and damages, the District Court of Appeal, Third District, held that "the findings of the trial court in that regard are not without support in the evidence." Point East Management Corp. v. Point East One Condominium Corp., 258 So.2d 322 (Fla.App.1972), at 325. It also accepted the trial court's finding that the Community Facility Lease was valid and binding by virtue of estoppel although "the lease in question contains provisions which *appear to be of a kind that might be expected to motivate a court of equity to grant relief* therefrom to the associations upon which the lease was thus imposed." Id. at 326. (Emphasis supplied.)

The doctrine of estoppel should not serve as a refuge for a party whose apparent fraud, as reflected in the record, effected the imposition of a 99-year lease at what would appear to be an exorbitant net rental of $222,000 per year, upon the apartment owners. An examination of the record indicates thay the lease in question should be declared void as not complying with Sections 711.08(1) (e) and 711.12, F.S.

I should like to reiterate a portion of my dissent in Fountainview Association, Inc. #4 v. Bell, supra, at 613, that has relevance to the cause instanter:

"It appears from the foregoing terms of the purchase contract, considered in the light of F.S. Chapter 711, F.S.A., that the purchaser of a unit is an assessed and paying member of the Association and consequently has a pecuniary interest in the continuing management of the Association, its fiscal affairs and expenses, similar to an ordinary corporate stockholder. Any fraud or mismanagement of the Association by its officers or diversion of monies or misuse of credit provided by the purchasers or to be provided by prospective purchasers of units for the acquisition of the land or construction of the project *or for the operation of the Association will be reflected in extra costs and losses to the membership and appear to be a proper subject of concern and inquiry of the apartment unit owners and in a proper case could be the subject of an equitable accounting.*

* * *

"A condominium association does not involve an arm's length relatinship as in the case of an outright sale of a dwelling between two strangers. It contemplates cooperative ownership of several apartment units in association with others and long continued, prudent management of the apartment building and the individual units as an integrated whole. If the project has been subjected to *promotional fraud in its inception or over-reaching in its management*, its ability to be successful as a viable, cooperative project over a long period

of time will be jeopardized. The assocation and its membership have a vital and continuing interest in seeing that its management is free of conflicts of interest and fraud.

* * *

"One of the primary purposes of our condominium law is to give the association members legal status similar to corporate stockholders so they may require, if necessary, that the condominium project be operated free of fraud and conflicts of interest . . ." (Emphasis supplied.)

The majority has seized upon an irrelevant, outmoded case (Lake Mable) decided long before condominiums and their statutory regulation were contemplated in Florida law and used it as the conflict basis to quash the relief afforded below. In vain have the Legislature and the lower courts attempted to provide remedies to condominium associations for patent developers' fraud and overreaching, always running afoul of curiously irrelevant decisions at this level.

The enigmatic formulation of another ill-founded decision in this area of the law only serves to put Florida further out of touch with the holdings of most jurisdictions. Florida has experienced a phenomenal growth in condominium housing in recent years; our jurisprudence should be undergoing a similar progression. It is time to bring a halt to a line of decisions that are frustrating our Legislature's efforts. See e.g., Fountainview Association, Inc. #4 v. Bell, supra; Riviera Condominium Apartments, Inc. v. Weinburger, 231

So.2d 850 (Fla.App.1970); Wechsler v. Goldman, 214 So.2d (Fla.App. 1968). As is stated in a recent law review article:

> "In most jurisdictions the developer is treated as a fiduciary acting on behalf of unknown persons who will purchase and become members of the association. Under this theory any *overreaching* could result in voidable sales contracts. However, as illustrated by the *Fountainview*, *Riviera*, and *Wechsler* decisions the Florida courts rejected the majority position. By casting condominiums within a corporate law framework the courts had permitted developers to bind future purchasers to contracts executed prior to transmission of board control to the unit owners. Since the rights of innocent parties did not arise until closing, developers could use legal gymnastics to gain exorbitant profits." *Florida Condominiums — Developer Abuses and Securities Law Implications Create A Need for a State Regulatory Agency*. 25 U. Fla. L. Rev., 350, 355 (1972).

BOYD, J., concurs

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 69-11434 (Judge James W. Kehoe)

POINT EAST CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

ANSWER OF DEFENDANT

The defendant, POINT EAST MANAGEMENT CORPORATION, a Florida corporation, for answer to Count IV and Count V of the complaint herein, says:

COUNT IV

36. Defendant admits the allegations realleged in paragraph 36 of the complaint.

37. Defendant denies the allegations contained in paragraph 37 of the complaint, and says it is untrue that any funds have been improperly paid or improperly charged to plaintiffs. Defendant says it is untrue that it misused any funds, or breached any of its duties, or breached any provisions of the Management

Agreement, or that defendant in anywise caused any harm to the financial structure of plaintiffs. Defendant specifically denies that it improperly charged or paid any estate taxes, or improperly paid or charged any expenses for emergency correction of structure defects, or improperly paid or charged any salaries. Defendant says that the cost of providing a piano and a flagpole for the use and benefit of plaintiffs at their request, constituted a proper expenditure of funds in accordance with the terms of the Management Agreement.

37-A. Further answering Count IV of the complaint, defendant denies that any basis exists for requiring an accounting. Plaintiffs have access to all of the defendant's books and financial records, and plaintiffs have examined the same. Defendant has furnished plaintiffs with statements of account accurately showing all receipts and disbursements of said funds. Moreover, plaintiffs have caused an independent audit of said funds to be made by a certified public accountant.

COUNT V

38. Defendant admits the allegations contained in paragraph 38 of the complaint.

39. Defendant admits the allegations contained in paragraph 39 of the complaint.

40. Defendant admits the allegations contained in paragraph 40 of the complaint.

41. Defendant admits the allegations contained in paragraph 41 of the complaint.

42. Defendant denies the allegations contained in paragraph 42 of the complaint.

43. Answering paragraph 43 of the complaint, defendant denies that there is any basis for controversy concerning the legal rights and duties of the parties under the Management Agreement and the provisions of Chapter 711, Florida Statutes. The provisions of the Management Agreement are clear and unambiguous, and such contractual arrangements are duly authorized by the applicable and controlling provisions of Chapter 711, Florida Statutes.

SCOTT McCARTHY STEEL
HECTOR & DAVIS
1414 First National Bank Building
Miami, Florida 33131
Attorneys for Defendant

By: /s/ Darrey A. Davis
DARREY A. DAVIS,
Of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer of Defendant has been furnished to FRATES, FAY, FLOYD & PEARSON, 12th Floor, Concord Building, Miami, Florida 33130, by mail, on this 17th day of November, 1969.

/s/ Darrey A. Davis
DARREY A. DAVIS.

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

NO. 69-11434 (J. W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

REQUEST FOR TRIAL BY JURY

Plaintiffs demand trial by jury on all issues triable as of right by a jury.

FRATES FAY FLOYD & PEARSON
Attorneys for Plaintiffs
12th Floor Concord Building
Miami, Florida 33130

By /s/ Gerald F. Richman
GERALD F. RICHMAN

WE HEREBY CERTIFY that a true copy of the foregoing Request for Trial by Jury was mailed this 26th day of November, 1969, to SCOTT McCARTHY STEEL HECTOR & DAVIS, Attorneys for Defendant 1414 First National Bank Building, Miami, Florida 33131.

By /s/ Gerald F. Richman
GERALD F. RICHMAN

IN THE CIRCUIT COURT OF THE 11TH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

NO. 69-11435 (Lee)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations, not for profit,

Plaintiffs,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON,

Defendants.

COMPLAINT

The plaintiffs, POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., (hereinafter ASSOCIATION ONE, ASSOCIATION TWO, ASSOCIATION THREE, ASSOCIATION FOUR, or collectively, the ASSOCIATIONS), by and through their undersigned counsel, sue the defendants, LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON, and allege that:

1. The above-named plaintiffs (hereinafter called the ASSOCIATIONS), are corporations not for profit organized and existing under the laws of the State of Florida, with their offices located in Dade County, Florida.

2. The defendants, LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON, are citizens and residents of the State of Florida, residing in Dade County, Florida.

3. Defendant, LEONARD SCHREIBER, served as president and a director of all four of the above-named associations from each of their inceptions until January, 1969.

4. Defendant, LEONARD PEARL, served as vice-president and a director of all four of the above-named associations from each of their inceptions until January, 1969.

5. Defendant, MARCOS GESUNDHEIT, served as secretary and a director of all four of the above-named associations from each of their inceptions until January, 1969.

6. Defendant, SIDNEY GORDON, served as treasurer and a director of all four of the above-named associations from each of their inceptions until January, 1969.

7. During the periods of time in which the above-named defendants served as officers of the four associations, they also were officers and directors of POINT EAST DEVELOPERS, INC., a Florida corporation,

and were officers of POINT EAST MANAGEMENT CORPORATION, INC., a Florida corporation.

COUNT I

8. During the period of time in which the defendants served as officers of the plaintiff associations, numerous defaults occurred on the part of the POINT EAST MANAGEMENT CORPORATION (hereinafter Manager) which defaults were known to the defendants.

9. These defaults included failure of the MANAGER to furnish each ASSOCIATION with an itemized list of delinquent accounts immediately following the 20th day of each month, as required by paragraph 4.3 of the Management Agreements, a copy of which, essentially identical to that executed by each Association, is attached hereto as Exhibit A; failure of the Manager to render to each ASSOCIATION a statement of its receipts and accounts for each calendar year no later than the 1st of April thereafter, as required by paragraph 4.8 of the Management Agreements; the failure of the Manager to maintain sufficient records to describe its services and to identify the source of all funds collected by it in its capacity as Manager and the disbursement thereof, as required by paragraph 4.9 of the Management Agreements; the failure of the Manager to establish reserves, both funded and unfunded for the payment of all costs and expenses of each ASSOCIATION as required by paragraph 4.10 of the Management Agreements; the failure of the Manager to timely notify each ASSOCIATION of the inadequacy of the assessments and other revenue to adequately fund

reserves and to pay all costs and expenses of the ASSOCIATION, as required by paragraph 5 of the Management Agreements; the failure of the Manager to timely provide the ASSOCIATIONS with a detailed budget on an annual basis, as required by paragraph 4.14 of the Management Agreements; the failure of the Manager to insure that any reserve funds collected for a specific ASSOCIATION be used only for that ASSOCIATION; and the failure of the Manager to properly maintain, provide for the operation of, and collect rents from the coffee shop in the Community Facility.

10. The defendants further knew that the Manager had and was improperly utilizing the maintenance funds and maintenance personnel of the Associations to repair and correct deficiencies in the structures and grounds of the premises that properly were the responsibility of POINT EAST DEVELOPERS, INC., this being done either without the knowledge of, or without the approval of, the members of the ASSOCIATIONS.

11. During the aforesaid periods of time, that is, from the date of incorporation of each of the four ASSOCIATIONS until the present directors of the ASSOCIATIONS took office in February, 1969, the officers and directors of the Manager were identical to the officers and directors of the four ASSOCIATIONS, each being the alter ego of the other, and each having the knowledge of the other. That the aforesaid defendants were thus fully aware of all of the acts and aforesaid duties and breaches of the Manager.

12. The aforesaid defendants, as officers and directors of the ASSOCIATIONS, had a fiduciary duty to

each ASSOCIATION and its members to enforce the provisions of the Management Agreements, and to see that ASSOCIATION funds were used in the interest of all of the members of the ASSOCIATIONS, but they failed and/or refused to do so, directly contrary to their fiduciary duties.

13. As a direct result of these breaches of duty, the ASSOCIATIONS and their individual members have suffered great financial loss and hardship, both individually and collectively; and reserves of the ASSOCIATIONS have been depleted and the financial structure of the ASSOCIATIONS greatly damaged; and the ASSOCIATIONS, because of the inequitable manner in which certain of the ASSOCIATIONS were caused to bear the costs and expenses of other ASSOCIATIONS, have suffered and will continue to suffer in the future, financial harm and damage, as well as consequent loss of confidence by the ASSOCIATION members and the general public, thus additionally producing a general diminution of property values of the ASSOCIATION members.

WHEREFORE, plaintiffs pray for a Judgment of damages against the defendants in excess of One Hundred Thousand Dollars ($100,000.00), plus reasonable costs and attorneys' fees.

COUNT II

14. Plaintiffs re-allege paragraphs 1, 2, 3, 4, 5, 6 and 7, and further allege that:

15. The defendants, having knowledge of the inadequacy of the assessments to pay costs and disburse-

ments, and to adequately fund reserves, and knowing further that the required conveyance of such knowledge to the members of the ASSOCIATION would result in increased assessments that would make the purchase of a living unit less attractive to prospective buyers, and would further result in action against the Manager for failure to request increased assessments, fraudulently and deceitfully failed to bring this information to the attention of the members of the Associations.

16. The defendants, by virtue of their being officers and directors of the aforesaid Associations were under a duty to fully disclose such information to the members of the Associations; and the members of the Associations relied upon them to carry out this duty.

17. Instead of conveying this information to the members of the Association and taking proper action upon it, the defendants failed to bring such information to the attention of the members; and further, both by their inaction where they had a duty to speak and by their failure to affirmatively require the Manager to maintain proper books and records, and to present an accurate financial portrayal to the Association and their members, fraudulently and falsely misrepresented to and concealed from the Association members such information.

18. The only information in fact conveyed to the members of the Association up until January, 1969, indicated that the revenue obtained from the assessments of the ASSOCIATION members was adequate to fund reserves and to meet the costs and disbursements necessary to the maintenance and functioning of the Associations without need for additional assessments.

19. In truth and in fact, these affirmative representations, and misrepresentations by a failure to speak when there was a duty to speak, were false and, in fact, funds were being misused by the Manager and the assessments and other revenue of the ASSOCIATIONS were not adequate to fund reserves and meet the costs of operation and maintenance of the condominiums.

20. The plaintiffs, relying upon said false representations and misrepresentations, were thereby induced into failing to take appropriate and timely measures to correct the deficiencies, prevent the misuse of funds, increase the assessments to maintain a sound financial condition, and take other appropriate action in the interest of the ASSOCIATIONS and their members.

21. Defendants well knew when they made the representations and misrepresentations aforesaid that they were false.

22. Plaintiffs, by their reliance upon said representations and misrepresentations, suffered damage in excess of Two Hundred Fifty Thousand Dollars ($250,000.00).

WHEREFORE, by reason of the defendants' fraud and deceit and the aforesaid false misrepresentations and failure to disclose, the plaintiffs have been damaged and pray for compensatory damages in excess of Two Hundred Fifty Thousand Dollars ($250,000.00) plus punitive damages in excess of One Hundred Thousand Dollars ($100,000.00), plus costs and reasonable attorney's fees.

FRATES FAY FLOYD & PEARSON
Attorneys for Plaintiffs
12th Floor Concord Building
Miami, Florida

By /s/ Ray Pearson
Of Counsel

By /s/ Gerald F. Richman
Of Counsel

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

NO. 69-11435 (Judge James W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

LEONARD SCHREIBER, et al.,

Defendants.

ANSWER OF DEFENDANTS

The defendants, LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON, for answer to the complaint herein, say:

1. Defendants admit the allegations contained in paragraphs 1, 2, 3, 4, 5, 6 and 7 of the complaint.

COUNT I

8. Defendants deny the allegations contained in paragraph 8 of the complaint.

9. Defendants deny the allegations contained in paragraph 9 of the complaint, and defendants say that if any defaults occurred they were waived by plaintiffs.

10. Defendants deny the allegations contained in paragraph 10 of the complaint, and defendants say it is untrue that Point East Management Corporation utilized maintenance funds and maintenance personnel to repair and correct any deficiencies which were the responsibility of Point East Developers, Inc.

11. Answering paragraph 11 of the complaint, defendants admit that, during the period of time stated therein, the Associations and the Management Company had the same officers and directors. Defendants deny the remaining allegations contained therein, and say it is untrue that the Management Company committed any improper acts or breached any terms of the Management Agreement.

12. Answering paragraph 12 of the complaint, defendants recognize their fiduciary relations and say that they fully performed their duties and responsibilities and acted in the best interests of the Associations and their members. Defendants deny they failed or refused to enforce the provisions of the Management Agreement, and deny that they failed or refused to see that funds of the Associations were used in the best interests of all the members of the Associations, and deny that they in anywise failed or refused to act commensurate with their fiduciary duties.

13. Defendants deny the allegations contained in paragraph 13 of the complaint, and defendants say it is untrue that either the plaintiffs or their members have suffered any financial loss and hardship; it is untrue that the reserves of the plaintiffs have been depleted and the financial structure damaged; it is untrue that any of the plaintiffs were caused to bear costs and

expenses of any other plaintiffs; and it is untrue that any of the plaintiffs have, or will in the future, suffer any financial harm and damages. Defendants deny that any basis exists for any loss of confidence by any members of the plaintiffs and the general public. Defendants deny that there have been any diminution of property values of any of the condominium properties, but that on the contrary there has been a tremendous increase in the property values thereof.

COUNT II

14. Defendants admit the allegations realleged in paragraph 14 of the complaint.

15. Defendants deny the allegations contained in paragraph 15 of the complaint, and defendants say that purchasers of condominium property in Point East were furnished copies of all instruments, including the Management Agreement, and were fully informed as to all pertinent information.

16. Answering paragraph 16 of the complaint, defendants say they made full disclosure of all information to all purchasers of condominium properties and members of the associations, and that defendants fully performed all of their duties and responsibilities.

17. Defendants deny the allegations contained in paragraph 17 of the complaint.

18. Defendants deny the allegations contained in paragraph 18 of the complaint. Defendants say that they conveyed appropriate information to the members

of the associations, and that such information was accurate.

19. Defendants deny the allegations contained in paragraph 19 of the complaint.

20. Defendants deny the allegations contained in paragraph 20 of the complaint.

21. Defendants deny the allegations contained in paragraph 21 of the complaint.

22. Defendants deny the allegations contained in paragraph 22 of the complaint.

SCOTT McCARTHY STEEL
HECTOR & DAVIS
1414 First National Bank Building
Miami, Florida 33131
Attorneys for Defendants

By: /s/ Darrey A. Davis
DARREY A. DAVIS,
Of counsel.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer of Defendants has been furnished to FRATES, FAY, FLOYD & PEARSON, 12th Floor, Concord Building, Miami, Florida 33130, by mail, on this 17th day of November, 1969.

/s/ Darrey A. Davis
DARREY A. DAVIS.

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

NO. 69-11435 (J. W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al,

Plaintiffs,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON,

Defendants.

REQUEST FOR TRIAL BY JURY

Plaintiffs demand trial by jury on all issues triable as of right by a jury.

FRATES FAY FLOYD & PEARSON
Attorneys for Plaintiffs
12th Floor Concord Building
Miami, Florida 33130

By /s/ GERALD F. RICHMAN
Gerald F. Richman

WE HEREBY CERTIFY that a true copy of the foregoing Request for Trial by Jury was mailed this 26th day of November, 1969, to SCOTT McCARTHY STEEL HECTOR & DAVIS, Attorneys for Defendants, 1414 First National Bank Building, Miami, Florida 33131.

By /s/GERALD F. RICHMAN
Gerald F. Richman

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY. AT LAW

NO. 69-11434 (James W. Kehoe)

POINT EAST ONE CONDOMINIUM CORP. INC. et al

Plaintiffs,

v.

POINT EAST MANAGEMENT CORP. a Fla. corp.

Defendant

CASE NO. 11435

POINT EAST ONE CONDOMINIUM CORP. INC. et al

Plaintiffs

v.

LEONARD SCHREIBER, et al

Defendants

ORDER SETTING CAUSE FOR TRIAL

THIS CAUSE is specially set for trial before a jury and the undersigned Judge in a courtroom assigned to his use in the Dade County Court House, Miami, Florida, the week of FEB. 24, 1970 & MARCH 2, 1970.

A copy of this Order shall be transmitted to the attorneys of record for each of the parties, and receipt of such copy shall constitute notice of the placing of such case on the Trial Calendar.

DONE AND ORDERED at Miami, Dade County, Florida, this 2nd day of December, 1969.

/s/ JAMES W. KEHOE
CIRCUIT JUDGE

Copies were mailed to the following attorneys of record on the above date:

Frates, Fay, Floyd & Pearson, *Attys.*
12th Fl. Concord Bldg.
Miami, Fla.

Scott, McCarthy, Steel, Hector & Davis, *Attys.*
1414 First National Bank Bldg.
Miami, Fla.

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR DADE COUNTY. AT LAW

NO. 69-11434 (James W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC. et al, Fla. corporations, not for profit,
Plaintiffs

v.

LEONARD SCHREIBER, et al
Defendants.

CASE NO. 69-11435

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al, Fla. corporations, not for profit
Plaintiffs

v.

POINT EAST MANAGEMENT CORP.
Defendants

AMENDED
ORDER SETTING CAUSE FOR TRIAL

THIS CAUSE is specially set for trial before a jury and the undersigned Judge in a courtroom assigned to his use in the Dade County Court House, Miami, Florida, the week of APRIL 20, 1970 & APRIL 27, 1970.

A copy of this Order shall be transmitted to the attorneys of record for each of the parties, and receipt of such copy shall constitute notice of the placing of such case on the Trial Calendar.

DONE AND ORDERED at Miami, Dade County, Florida, this 18th day of February, 1970.

/s/ JAMES W. KEHOE
CIRCUIT JUDGE

Copies were mailed to the following attorneys of record on the above date:

Frates, Fay, Floyd & Pearson, *Attys, for Plaintiffs*
12th Fl. Concord Bldg.
Miami, Fla.

Scott, McCarthy, Hector & Davis, *Attys, for Defendants*
1414 First National Bank Bldg.
Miami, Fla.

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

CASE NO. 69-11434
(Judge J. W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

CASE NO. 69-11435

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit.

Plaintiffs,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON,

Defendants.

ASSIGNMENTS OF ERROR

The plaintiffs, POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit, assign and designate as error upon which they rely, the following judicial acts in the lower court:

1. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of the Second Amended Complaint in Case No. 69-11434) denying plaintiffs' action for damages for breach of the Management Agreements between plaintiffs and defendant.

2. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count I of the Complaint in Case No. 69-11435) denying plaintiffs' action for damages against the individual defendants for breach of their fiduciary relationships to the plaintiff Associations during their tenure as officers and directors of said Associations.

3. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11435) denying plaintiffs' action for damages against the individual defendants for damages, fraud, and misrepresentation during their tenure as officers and directors of said Associations.

4. The Court erred (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435) by

denying plaintiffs' Motion for Rehearing. Plaintiffs incorporate by reference herein each and every ground stated in said Motion for Rehearing.

5. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435), by its finding that said Counts rely upon affirmance of contractual relationships between the parties.

6. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435), by its finding that plaintiffs relied upon the same factual matters for equitable relief and recovery of damages.

7. The Court erred in rendering its Order of Dismissal with Prejudice (as to Counts I and II of Case No. 69-11435) by failing to find that the Doctrine of Election of Remedies was inapplicable because the parties in said Case No. 69-11435 were different from those in Case No. 69-11434.

8. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435) by applying the Doctrine of Election of Remedies to attempted remedies which the Court had already found to have been inefficacious, premature and non-existent.

9. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435) when the Counts involved were not clearly unamendable.

10. The Court erred in rendering its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Count I and II of Case No. 69-11435) by failing to enter an Order of Dismissal with leave to amend when the Counts and factual situations evidenced therefrom on their face indicated that the Complaints and Counts involved were amendable or, alternatively, that they were not clearly unamendable.

11. The Court, in its Order of Dismissal with Prejudice (as to Count II of Case No. 69-11434 and Counts I and II of Case No. 69-11435) erred by severing these Counts for trial and by failing and refusing to have them tried with the other Counts in Case No. 69-11434.

FRATES FAY FLOYD & PEARSON
Attorneys for Plaintiffs
12th Floor Concord Building
Miami, Florida 33130

By /s/ RAY PEARSON
Ray H. Pearson

WE HEREBY CERTIFY that a true copy of the foregoing Assignments of Error was mailed this 26th day of October, 1970, to McCarthy Steel Hector & Davis, Attorneys for the Defendants, 1414 First National Bank Building, Miami, Florida 33131.

By /s/ RAY PEARSON
Ray H. Pearson

IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT OF FLORIDA

CASE NO. 70-938

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Appellant,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al,

Appellees.

CASE NO. 70-948 and
NO. 70-1043

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al,

Appellants,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Appellee.

CASE NO. 70-949 and NO. 70-1043

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al,

Appellants,

vs.

LEONARD SCHREIBER, et al,

Appellees.

PETITION FOR RE-HEARING AND FOR CLARIFICATION

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al appellees/cross-appellants in Case No. 70-938, and appellants in Case No.'s 70-949 and 70-1043, by and through their undersigned counsel, move for re-hearing and/or clarification based upon the following grounds:

1. The Court in its opinion of February 8, 1972, page 5 thereof, in which the Court has stated:

> "*On a similar basis* we affirm the holding of the trial court which denied the relief sought by the plaintiffs in the form of damages against the Individual Defendants"

in apparent reference to the trial court's dismissal of the causes of action for fraud and deceit against the Individual Defendants in their capacities as officers and directors of the plaintiff Associations, has overlooked the following:

A. The immediately proceeding matter referred to was the Court's affirmance of the trial court's denial of an *accounting* based upon *specific evidentiary findings* as to the Management Corporation.

B. That basis has no possible relationship to the entirely separate causes of action for *fraud and deceit* against the officers and directors individually who, in their capacity as officers and directors, *were not even* parties to the non-jury trial.

C. As appears from the Order of the trial court, dismissal of the Counts seeking damages for fraud and deceit against the officers and directors individually was based upon *an election of remedies*; that is, that the equitable and legal claims arose out of the same factual matters and the facts were determined by the Court in its trial of the equity claims.

D. An *election of remedies* or an inferential finding that the facts have already been adjudicated and are *res judicata* is totally contrary to all of the applicable established principles of law since:

(1) There cannot possibly be an election of remedies as to persons who *were not parties to the action*, to-wit: The officers and directors individually in that capacity. The claims against them were specifically served by the Court *on its own motion*.

(2) The Record does not establish that the plaintiff Associations either directly or indirectly elected to have the equity issues tried first; on the contrary, the Court's severance of the Counts *on its own motion* and subsequent trial of the non-jury issues first with a subsequent

dismissal of the jury issues has effectively deprived the plaintiff Associations of their Constitutional right to trial by jury under the Seventh Amendment to the Constitution of the United States. See, *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962) wherein the Supreme Court of the United States held that where there were common issues in both legal and equitable claims, ". . . the legal claims involved in the action *must be determined* prior to any final court determination of respondent's equitable claims." *Id*, at 479.

(3) There is no election of remedies since the action for fraud and deceit involves specific acts of misrepresentation and fraud independent of the existence or non-existence and affirmance or disaffirmance of the Management Agreement.

(4) The effect of affirmance of the trial court's ruling is to deprive the Associations of their actions for damages by *trial by jury* in excess of $240,000 compensatory damages and $500,000 punitive damages for fraud and deceit which issues were never submitted to or determined by the trial court.

E. Whereas the accounting sought damages for *misuse*, misappropriation or improper expenditure of the Associations' funds gained through assessment, the action against the officers and directors for fraud and deceit was based upon entirely different facts and different allegations, to-wit: (1) failure to raise assessments to insure a reserve; and (2) failure to advise the members of the depletion of the reserve, neither of which issues were involved in the items for which accounting was sought.

WHEREFORE, Appellants and Appellees respectfully pray that a re-hearing be granted as to Case No. 70-1043, Appellants' Assignments of Error No.'s 2, 3, 4, 5, 6, 7 and 8.

FRATES FLOYD PEARSON & STEWART
Attorneys for Point East One Condominium Corporation, Inc., et al
12th Floor Concord Building
Miami, Florida 33130

By /s/ Ray Pearson
Ray H. Pearson

By /s/ Gerald F. Richman
Gerald F. Richman

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Re-Hearing and for Clarification was mailed this 18th day of February, 1972, to Darrey A. Davis, Esquire, McCarthy Steel Hector & Davis, Attorneys for Point East Management Corporation, Schreiber, Pearl, Gesundheit and Gordon, 1414 First National Bank Building, Miami, Florida 33130.

FRATES FLOYD PEARSON & STEWART

By /s/ Gerald F. Richman
Gerald F. Richman

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

JANUARY TERM, A.D. 1972
WEDNESDAY, MARCH 8, 1972

CASE NO. 70-938

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Appellant,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Appellees.

CASE NOS. 70-948
70-1043

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Appellants,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida Corporation,

Appellee.

CASE NO. 70-949

POINT EAST ONE CONDOMINIUM CORPORATION, INC. et al.,

Appellants,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT and SIDNEY GORDON,

Appellees.

Counsel for Point East One Condominium Corporation, Inc., et al., and for Point East Management Corporation, a Florida corporation, having each filed a petition for rehearing in this cause, and same having been considered by the court which determined the cause, it is ordered that said petitions be and they are severally denied.

A True Copy

ATTEST:

/s/ WILLIAM P. CARTER
Clerk District Court of
Appeal, Third District

cc: Frates, Floyd, Pearson & Stewart
McCarthy, Steel, Hector & Davis

(THE MANDATE IN THE ABOVE STYLED CAUSE HAS TODAY BEEN ISSUED AND MAILED TO THE CLERK OF THE CIRCUIT COURT IN AND FOR DADE COUNTY, FLORIDA)

IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,228

POINT EAST MANAGEMENT CORPORATION, a Florida Corporation,

Petitioner,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION INC., a Florida non-profit corporation, et al.,

Respondents-Cross Petitioners,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation, et al.,

Cross-Respondents.

CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-Petitioners, POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit, et al., (hereafter the ASSOCIATIONS) present this their Cross-Petition for Writ of Certiorari and state:

1. Cross-Petitioners seek to have reviewed a decision of the District Court of Appeal, Third District, *Point East Management Corporation v. Point East One Condominium Corporation, Inc., et al.*, 258 So.2d 322 (3 D.C.A. Fla. 1972), dated the 8th day of February, 1972, and filed in the records of said Court in Minute Book 43, at Page 276 (Petition for Rehearing denied on March 8, 1972).

2. This Cross-Petition is presented under and pursuant to Article V, Section 4, of the Florida Constitution, and Rule 4.5c of the Florida Appellate Rules.

3. This Cross-Petition is accompanied by a Transcript of Record of the proceedings, consisting of the decision Cross-Petitioners seek to have reviewed, and a supporting brief.

4. The following are the facts of the case:

(a) The ASSOCIATIONS who were the Plaintiffs below are four condominium associations comprised of all the owners of the 1,266 condominium units in the POINT EAST complex containing 17 separate multi-storied apartment buildings.

(b) The condominium units were purchased by the individual unit owners from Point East Developers, Inc. (hereafter the DEVELOPERS), between January, 1966, through December, 1968.

(c) Four separate Declarations of Condominium were filed as to the four ASSOCIATIONS; appended to each were two documents involved herein:

(1) The Management Agreements between the ASSOCIATIONS and the POINT EAST MANAGEMENT CORPORATION (hereafter referred to as MANAGER), which was a defendant below and is a Cross-Respondent herein.

(2) The Community Facilities Leases between the ASSOCIATIONS and the four LESSORS (hereafter referred to collectively as the LESSORS), which were defendants below and are Cross-Respondents herein.

(d) The initial officers and directors of the ASSOCIATIONS, the MANAGER, and the DEVELOPER, as well as the individual LESSORS, were the same identical people, LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT, and SIDNEY GORDON (hereafter referred to as the INDIVIDUAL DEFENDANTS).

(e) The officers and directors of the ASSOCIATIONS did not resign their offices nor permit an election until January, 1969, when the entire Complex was completed and occupied. The actions against the MANAGER, LESSORS, and INDIVIDUAL DEFENDANTS, out of which the Petition and Cross-Petition arose, were brought by the first directors elected by the owners of the individual apartments after two and one-half years of control of the ASSOCIATIONS by the INDIVIDUAL DEFENDANTS.

(f) Although the buildings comprising ASSOCIATIONS ONE and TWO were substantially completed and occupied by June, 1967, the ASSOCIATIONS' members were then and thereafter until December of 1968, actually prevented from holding meetings, exer-

cising any control in the affairs of the ASSOCIATIONS or obtaining any information as to the financial condition of the ASSOCIATIONS.

(g) Contrary to the Condominium Act which places responsibility for management upon the ASSOCIATIONS, actual management of the entire Complex (including individual units, recreational facilities, and common areas) was delegated to the exclusive control of the MANAGER by the Management Agreements which each ASSOCIATION entered into prior to any apartment closings. Each Agreement extended over a 22 to 25-year period for which the MANAGER received a net six percent (6%) of all assessments collected. (See pages A.1-11 of Respondent's-Cross Petitioners' Supplemental Transcript of Record and Respondents' Brief on Jurisdiction pages 3-6).

(h) The uncontradicted evidence revealed that the MANAGER had failed to perform or improperly performed the following functions that were specifically required by the Management Agreements:

(1) Furnish itemized list of delinquent accounts monthly.

(2) Render a yearly statement of receipts and disbursements.

(3) Maintain records in accordance with prevailing accounting standards.

(4) Establish reserves both funded and unfunded. Instead, the ASSOCIATIONS operated at a substantial deficit for two and one-

half years and, at the time of assumption of control by the individual unit owners, were insolvent with one ASSOCIATION having a $14,000.000 deficit. At the time of takeover, the deficit was increasing at the rate of some $10,000.00 a month.

(5) The detailed budget required to be submitted each year to the ASSOCIATIONS at least 45 days prior to the commencement of the new year was never submitted or prepared in 1966, 1967, or at the required time in 1968, nor was the initial budget in any way changed or modified despite rising costs and the deficit operation which could have been completely prevented according to the uncontradicted expert testimony by use of proper budgetary controls.

(i) In addition, a review of the overall records indicated that:

(1) No Federal Income Tax Returns had been filed for 1966, 1967, or 1968.

(2) Maintenance records were completely inadequate and maintenance personnel and ASSOCIATION funds had been substantially utilized for the DEVELOPER'S benefit without any repayment to the ASSOCIATIONS, as evidenced by the fact that when the seventeenth building was completed and sold the project needed only five maintenance employees, whereas during the development of the project the MANAGER had utilized as many as ten employees.

(3) A "funding fee," equivalent to four months of assessments, which had been charged to each purchaser under the representation that it was to be used either as a reserve fund, to be held in escrow, or to be used for emergencies, was completely used up and depleted in the two and one-half years of deficit operation.

(4) This then required an immediate 38 percent increase in assessments as soon as the unit owners assumed control, and Purchasers in December of 1968 were thus faced with this increase only a month or two later when the unit owners were finally permitted to learn the financial condition of their ASSOCIATIONS.

(j) Rescission was sought for the following additional grounds all of which were established by the uncontroverted evidence of Record:

(1) The aforementioned misuse of maintenance personnel:

(2) The use of funds of one ASSOCIATION to fund the debts of another:

(3) The failure to properly run the restaurant (R. 556-560, 1257-1263):

(4) The failure to seek and employ cost reductions such as the janitorial and bank proposals; and

(5) Entering into an exorbitant and unreasonable contract for legal services and

then wilfully failing and refusing to disclose to the ASSOCIATIONS its existence.

(k) The Point East Community Recreational Facilities consist of an auditorium that was to seat 1,200 people, cardrooms, meeting halls, offices and a medical center which includes doctors' offices and a gymnasium. Under the Community Facilities Leases, the ASSOCIATIONS are obligated to pay an annual rental of $220,000.00 a year for a period of 99 years with an escalation clause to increase the rental payment every five years based upon any cost of living increase.

(l) The leases contained no description of the actual facilities that were to be constructed but instead contain only a metes-and-bounds description of the underlying land.

(m) Uncontradicted expert testimony indicated that none of the sales brochures or models in the DEVELOPER'S offices was sufficient to enable the purchaser to determine the actual seating capacity of the auditorium, the number of cardrooms, the number of other rooms or the purposes of the rooms. The auditorium as built contained 920 seats instead of the 1,200 seats that had been represented in the sales brochures.

(n) Initial purchasers in the first ASSOCIATION using the same auditorium and community facilities, nor were the purchasers permitted to walk through the facilities that were under construction.

(o) A visible description of the clubhouse administrative building, or other community facilities was never recorded in any public records.

(p) The Condominium Act provides in pertinent part that the Declaration shall contain:

> "Survey of the land and a graphic description of the improvements in which units are located and a plot plan thereof which together with the declaration are in sufficient detail to identify the common elements and each unit and their relative locations and approximate dimensions. Such survey, plot plan and description may be in the form of exhibits consisting of building plans, floor plans, maps, sketches, surveys or other means, provided that there shall be included or attached a certificate or certificates of an architect, engineer or surveyor authorized to practice in this state that such material, together with the wording of the declaration, is a correct representation of the improvements described, and that there can be determined therefrom the identification, location, dimensions and size of the common elements and of each unit." Fla. Stat. §711.08(e).

Failure to comply with the provisions of the Act effectively deprived the purchasers at least as to ASSOCIATIONS ONE and TWO of any opportunity to know the size, cost or adequacy of the facilities they were receiving.

(q) INDIVIDUAL DEFENDANTS, in their capacity as officers and directors of the ASSOCIA-

TIONS for two and one-half years, ignored budgetary controls, did not attempt to reduce expenditures, maintained a uniform assessment while sales were occurring over the two and one-half year period despite deficit operation, and impending insolvency, prevented members of the ASSOCIATIONS from holding meetings in their clubhouse facilities, knowingly allowed all of the managerial faults and misuses of funds enumerated above to occur, fraudulently and deceitfully failed to increase assessments to fund reserves while costs were escalating and the funding fee of $244,000.00 was being totally depleted, and refused the request of unit owners for financial and budgetary information stating that its "none of your business". They also assisted in concealing from the ASSOCIATIONS' members a 25 year $250,000.00 contract to be paid by the ASSOCIATIONS for legal services to the MANAGER'S attorney, Stanley Spieler, who had simultaneously "provided" legal services for the DEVELOPER, the ASSOCIATIONS, the LESSORS and the MANAGER, but who at trial actively assisted and testified for the MANAGER and LESSOR while receiving the legal fees from the ASSOCIATIONS under their protest.

(r) After rendering its decisions upholding the validity of the Community Facility Leases, denying cancellation of the Management Agreements, denying an accounting, and declaring the Management Agreements void as a matter of law following a trial without a jury, the trial court dismissed the actions for deceit and breach of trust against the INDIVIDUAL DEFENDANTS for which trial by jury had been timely demanded, apparently on a *sub judice* application of the Doctrine of Election of Remedies.

5. On the foregoing facts the Court was presented with the following Point of Law:

> WHETHER THE ASSOCIATIONS CAN BE DEPRIVED OF THE RIGHT OF EQUITABLE CANCELLATION OF TWENTY-FIVE YEAR MANAGEMENT AGREEMENTS BASED UPON NUMEROUS SPECIFIC AND IRREPARABLE DEFAULTS BECAUSE THEY (A) FAILED TO DO A USELESS AND VAIN ACT; THAT IS, GIVING SIX-DAYS' NOTICE PRIOR TO BRINGING SUIT, AND (B) BECAUSE THEIR FORMER OFFICERS AND DIRECTORS WHO ALSO AT THE SAME TIME OFFICERED THE DEFAULTING MANAGEMENT CORPORATION WAIVED THE DEFAULTS WITHOUT THE KNOWLEDGE, INTENT, OR CONCURRENCE OF THE MEMBERS OF THE ASSOCIATIONS WHO WERE AFFIRMATIVELY PREVENTED FROM LEARNING OF THE DEFAULTS.

On this Point of Law, the District Court of Appeal, Third District, while noting that

> "the brief of the Appellant enumerates features of control and management which thus were placed beyond the grasp of the ASSOCIATIONS, and which revealed the practical (monetary) losses occasioned thereby to the unit owners, as well as the legally improper results which flowed therefrom"

nevertheless implicitly affirmed the ruling of the trial court that;

"Plaintiffs have failed to prove their allegations and the equities are with the defendant. The plaintiffs, *while under the control of the individual defendants herein, were authorized and empowered to waive the matters of which plaintiffs now complain*, and the breaches or defaults asserted to be continuing in nature are wholly insufficient to justify cancellation of the Management Agreement. Moreover, the notice requirements of the Management Agreement governing defaults of the defendant were not complied with by the Plaintiffs." (emphasis added).

6. The same point of law was involved in *Jones v. West Palm Beach*, 76 Fla. 66, 79 So. 438 (1938) wherein the Court stated that a "waiver is an intentional relinquishment of a known right". *Id,* 79 So. 441. The Record which conclusively establishes the intentional concealment of the defaults, both by the MANAGER and by the INDIVIDUAL DEFENDANTS, prevented the ASSOCIATIONS or their members from either knowingly or intentionally relinquishing their rights with respect to default.

The same Point of Law with respect to finding of waiver by failure to comply with the notice requirements of the Management Agreements was involved in the case of *Behrman v. Max*, 102 Fla. 1094, 137 So. 120 (1931), wherein this Court held that ". . . law does not require anyone to do a vain or useless act . . . ." While that case involved a finding that a formal tender need not be made where it clearly appears that it would not be accepted, the same principal is applicable to the instant case where the Record demonstrates by the

manifest uncontroverted weight of the evidence that the required 60-days notice of default when the vast majority of the damages was irreparable and had already occurred over a two and one-half year period would also have been a useless formal gesture.

Cross-Petitioner would note to the Court at this point that the above point of law and *direct conflict* need be considered only if the MANAGER'S Petition be granted, since the District Court's affirmance of the trial court's ruling as to the invalidity of the management contracts as a matter of law renders moot any ruling with respect to cancellation of the management contracts for specific breaches and would thus make it unnecessary to consider this point.

7. On the foregoing facts, the Court was presented with the following additional point of law:

> WHETHER A TRIAL COURT'S DECREE THAT IS MANIFESTLY AGAINST THE WEIGHT OF THE EVIDENCE AND IS UNSUPPORTED BY THE LEGAL EFFECT OF THE EVIDENCE IS CLEARLY ERRONEOUS AND MUST BE REVERSED.

On this Point of Law the District Court of Appeal, Third District, in a ruling that is clearly contrary to the uncontroverted and manifest weight of the evidence held:

> "The trial court was the trier of the facts. The ruling was made upon consideration of the evidence relating to the subject, and the findings of the trial court in that regard are not

without support in the evidence. The decision of the trial court thereon carries a presumption of its correctness, particularly when so based."

8. The same Point of Law was involved in the decisions of this Court in *Kellogg v. Porter,* 155 Fla. 287, 20 So.2d 59 (1944); *Peck v. Osteen*, 37 Fla. 427, 20 So. 549 (1896); and the decisions of the Second District Court of Appeal in *Shaffron v. Holness*, 102 So.2d 35 (2 D.C.A. Fla. 1958); and *Allen v. Wilhelm*, 113 So.2d 857 (2 D.C.A. Fla. 1959), all of which hold that while a Chancellor's finding should not be disturbed unless shown to be clearly erroneous,

> " '. . . where a decree is manifestly against the weight of the evidence or contrary to, and unsupported by the legal effect of the evidence, than it becomes the duty of the Appellate Court to reverse such decree.' " *Kellogg v. Porter, supra*, 20 So.2d 63.

9. On the foregoing facts the trial court was presented with the following additional Point of Law:

> WHETHER PURCHASERS OF CONDOMINIUM UNITS MAY BE ESTOPPED FROM SEEKING TO SET ASIDE UNCONSCIONABLE COMMUNITY FACILITY LEASES THAT FAIL TO COMPLY WITH THE DISCLOSURE REQUIREMENTS OF THE CONDOMINIUM ACT AND ARE AGAINST PUBLIC POLICY.

On this Point of Law, the District Court of Appeal,

Third District, affirmed the ruling of the trial court that:

> "the evidence establishes that the Community Facility Leases are valid and binding by virtue of estoppel; that defendants made full disclosure concerning the facilities described therein, and that the plaintiffs and their respective members had appropriate knowledge and information concerning the facilities at the times of purchase of the condominium units, and the Community Facility Leases were duly ratified and confirmed".

The District Court then added that:

"While the lease in question contains provisions which appear to be of a kind that might be expected to motivate a court of equity to grant relief therefrom to the ASSOCIATIONS upon which the lease was thus imposed, we affirm the ruling of the trial court with relation to the lease, on the grounds stated in the judgment as above quoted."

10. The same Point of Law was involved in the case of *City of Miami v. Benson*, 63 So.2d 916 (Fla. 1953, *en banc*) wherein this Court after finding a contract to be contrary to public policy and stating that a ". . . statute is merely declaratory of a public policy . . .," *Id.* at 921, held the contract to be void and unenforceable, noting that ". . . [l]ife cannot be breathed into a void contract . . ." *Id.* at 923.

With respect to estoppel the same Point of Law as that decided by the District Court was involved in the

case of *Griffen v. Bolen*, 149 Fla. 377, 5 So.2d 690 (1942), wherein this Court recognized that estoppel was a Doctrine interposed to prevent fraud for injustice. The Record shows no factual basis that would indicate either fraud or injustice but instead, as above noted by the District Court, establishes that the "lease in question contains provisions which appear to be of a kind that might be expected to motivate a Court of equity to grant relief therefrom to the ASSOCIATIONS upon which the lease *was thus imposed* . . ."

11. On the foregoing facts the Court was presented with the following additional Point of Law:

> WHETHER THE CONDOMINIUM ASSOCIATIONS HAVE ELECTED REMEDIES AND ARE BARRED FROM THEIR RIGHT TO A JURY TRIAL FOR DAMAGES FOR BREACH OF TRUST AND DECEIT AGAINST THEIR FORMER OFFICERS AND DIRECTORS (THE INDIVIDUAL DEFENDANTS) BECAUSE THE TRIAL COURT, ON ITS OWN MOTION, REQUIRED THE ASSOCIATIONS TO FIRST TRY WITHOUT A JURY THE EQUITABLE CAUSE OF ACTION FOR CANCELLATION AGAINST THE MANAGER, A DIFFERENT PARTY, WHICH ACTION INVOLVED SIMILAR FACTS BUT WAS A CONSISTENT AND DIFFERENT CAUSE OF ACTION REQUIRING A DIFFERENT BURDEN OF PROOF.

The District Court of Appeal, Third District, affirmed the ruling of the trial court dismissing the

actions for deceit for damages against the ASSOCIATION'S officers and directors for which a jury trial had been demanded, wherein the trial court had stated:

> "The equitable remedies sought by plaintiffs are based on disaffirmance of the contractual relations *between the parties*. The remaining three counts allege claims for damages, and seek judgment for damages based upon affirmance of the same contractual relations *between the parties*. Plaintiffs allege and rely upon the same factual matters for equitable relief and for recovery of damages. All the issues involved in the six claims of an equitable nature were tried before the Court, and final judgment rendered thereon." (Emphasis added).

The District Court in its affirmance, after having affirmed the ruling of the trial court that a basis for an accounting was not shown, on the grounds that the trial court was "the trier of the facts", stated cryptically:

> "*On a similar basis* we affirm the holding of the trial court which denied the relief sought by the Plaintiffs in the form of damages against the Individual Defendants."

12. There are numerous cases involving Points of Law in *direct conflict* with the above decision of the Third District Court of Appeal, and they are enumerated and discussed in Cross-Petitioners' Brief on Jurisdiction accompanying this Petition. For purposes of summarization in this Petition the following cases, each involving Points of Law in *direct conflict* with the

decison of the Third District Court of Appeal are presented as examples with the preface that the ASSOCIATIONS, after demanding trial by jury on the actions for damages for deceit against their former officers and directors, were *required* by the trial court to first proceed against the defendant-MANAGER, a separate corporate entity, on the different issue of equitable cancellation of the Management Agreements, and in denying cancellation the trial court stated and the District Court affirmed that:

> "The plaintiffs *while under the control of the Individual Defendants* herein, were authorized an empowered to waive the matters of which Plaintiffs now complain . . ."

(a) The same Point of Law as to the right to a cause of action for breach of fiduciary duty against an officer or director of a corporation was involved in the case of *Flight Equipment and Engineering Corp. v. Shelton*, 103 So.2d 615 (Fla. 1965), wherein this Court held:

> "An officer or director occupies a quasi-fiduciary relation to the corporation and the existing stockholders. He is bound to act with fidelity and the utmost good faith. He is bound to be loyal to his trust. In accepting the office he impliedly agrees and undertakes to give the corporate enterprise the benefit of his best care and judgment and to exercise the powers conferred on him solely in the interest of the corporation and stockholders.

* * *

> "Officers and directors of a corporation are liable for damages to the corporation which result from a breach of their trust, a violation of authority or neglect of duty. This liability rests on the common law rule that every agent is responsible to his principal for such acts which result in damage to the principal." *Id*, at 626, 627.

(b) The same Point of Law with respect to the Doctrine of Election of Remedies and its requirement that the same parties be involved was involved in the case of *Board of Public Instruction v. Mathis*, 132 Fla. 289, 181 So. 147 (1938), in which this Court stated:

> "The suits are *separate demands against different parties*, and, as a matter of law, can be followed until the demand or claims of the School Board have been paid and satisfied." *Id.*, 181 So. at 149.

The same Point of Law with respect to the Election of Remedies Doctrine and its requirements that there be an identity of causes of action was involved in the case of *Mathews v. Mathews*, 133 So.2d 91 (2 D.C.A. Fla. 1961), in which the District Court of Appeal, Second District, held that a decree dismissing Plaintiff's cause of action in equity for fraud was not *res judicata* as to plaintiff's subsequent action in law based on deceit since the decree of proof required in the earlier action was greater. In that case, which is on all fours to the facts and Point of Law in the instant case since the remedy of cancellation sought by the ASSOCIATIONS against the MANAGER in equity required "clear and

convincing evidence", *Fletcher v. Moriarty*, 62 Fla. 482, 56 So. 437 (1911), while the subsequent action against the INDIVIDUAL DEFENDANTS at law for deceit and breach of trust requires the lesser burden or proof of only a preponderance of evidence, the Court stated:

> "For there to be 'identity of cause of action', within the meaning of the doctrine, the degree of proof required in the second suit must be at least as great as that required to support recovery in the first suit. If the degree of proof required in the first suit is greater than that required in the second, the cause of action cannot be held to be the same.
>
> "The fact that the matters pleaded in the 1955 equity suit and in the present common law action were identical, does not, in and of itself, establish 'identity of cause of action' — an indispensable element under the doctrine of res judicata — for the following reason. In the equity suit, it was necessary for the plaintiff to prove the allegations of his complaint by at least 'clear and convincing evidence'.
>
> * * *
>
> "As contrasted with this, the classic tort of deceit at common law, requires proof by only a 'preponderance of the evidence.'
>
> * * *
>
> "Hence, it follows that the defense of res judicata must fail in the instant case for want

of 'identity of cause of action' because of the difference in the *degree of proof* required in the equity and common law cases." Id. at 94, 95.

(c) The same Point of Law is also involved in the case of *Perry v. Benson*, 94 So.2d 819 (Fla. 1957), which holds that to constitute an "Election of Remedies", the remedies sought must not only be inconsistent but also be co-existent and that a remedy is not co-existent where a first cause of action for recession is denied because it was not timely brought by the failure of the Plaintiff to have first made demand to cure the defect or to wait a reasonable time for the defect to be cured after putting the Defendant on notice. Since the ruling of the trial court affirmed by the District Court in the instant case held as an alternative ground that " . . . the notice requirements of the Management Agreement governing defaults of the Defendant were not complied with by the Plaintiffs", the case of *Perry v. Benson, supra*, is also on all fours to the Point of Law presented to the District Court in the instant case.

(d) The same Point of Law involving the right to a jury trial and the Chancellor's exercise of discretion in denying a Plaintiff's timely demand for trial by jury was involved in Hightower v. Bigoney, 156 So. 2d 501 (Fla. 1963) in which this Court stated:

> "It is settled that one may by affirmative plea or by silence waive his right to a jury trial but when a litigant timely appears, as he did in this case, and enters a plea for it or claims it in proper manner, that claim and not the chancellor's discretion is the final word and it is the duty of the court to make provisions for it

because Section 3, Declaration of Rights, guarantees it." *Id.* at 503.

(e) The same Point of Law as it involved an affirmance by a District Court of a ruling by a trial court that is against the manifest weight of the evidence was involved in the cases cited above under paragraph 7 and for the reasons cited therein.

13. The decision of the District Court of Appeal, Third District, which Petitioner seeks to have reviewed is in direct conflict with the above mentioned decisions of this Court. Because of the reasons and authorities set forth in Cross-Petitioner's Brief, it is believed that the decision hereby sought to be reviewed is erroneous and that the conflicting decisions of this Court and of other District Courts of Appeal are correct and should be reaffirmed by this Court as the controlling law for the State of Florida.

WHEREFORE, Cross-Petitioners request this Court to grant a writ of certiorari and enter its Order quashing the decision herein sought to be reviewed, reaffirming the decisions of this Court and other District Courts of Appeal as the correct decisions, and granting such other and further relief as shall seem right and proper to the Court.

Respectfully submitted,

FRATES FLOYD PEARSON & STEWART
Attorneys for Respondents-Cross Petitioners
12th Floor Concord Building
Miami, Florida 33130

By /s/ RAY PEARSON
Ray H. Pearson

By /s/ GERALD F. RICHMAN
Gerald F. Richman

WE HEREBY CERTIFY that a true copy of the foregoing Cross-Petition for Writ of Certiorari was hand delivered this 27th day of April, 1972, to McCARTHY, STEEL, HECTOR & DAVIS, Attorneys for Petitioners-Cross Respondents, 1414 First National Bank Building, Miami, Florida 33131.

By /s/ GERALD F. RICHMAN
Gerald F. Richman

IN THE SUPREME COURT OF FLORIDA

CASE NO. 42,228

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Petitioner, Cross/Respondent,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., a Florida nonprofit corporation, et al.,

Respondents, Cross Petitioners,

PETITION FOR REHEARING AND CLARIFICATION

Respondents, POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION INC., and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., file this their petition for rehearing directed to this Court's decision dated 31 July 1973 and as grounds therefore would show that this Court through five of its seven Justices must have overlooked and failed to consider:

1. That this Court's opinion on its own face discloses total lack of conflict jurisdiction under Florida Constitution, Article V, Sec. 3(b) (3) F.S.A. At page 1, this Court bases its jurisdiction on conflict with *Lake Mabel Development Corporation v. Bird*, 99 Fla. 253, 126 So. 356 (1930) and on page 2 acknowledges that the

appellate court ruled in accordance with *Lake Mabel, supra*. See Justices Erwin and Boyd dissent explaining this significant fact at page 5.

2. This Court obviously misconstrued, misapplied or misunderstood the basis of the lower courts' cancellation of the management contract. The lower courts *did not rule* that the legislature restricted the condominium association's ability to contract for the management of the association; the lower courts held that the statute requires that ultimate control remain in the associations, and that this particular contract denuded the owners of the control contemplated by the legislature.

3. This Court's conclusion that the enactment of F.S. § 711.13(4) (which allows cancellation of initial management contracts by a 75% owner's vote) shows that there is no legislative intent to void all initial management agreements. This Court overlooks the fact that by the same act, the legislature recognized that not all initial management agreements are valid and binding on the unit owners.

4. This Court overlooked the most logical interpretation of statutory intent attributable to chapter 711; — that is, the legislature recognized that public policy demands not only that ultimate control be in the unit owners themselves, (§711.12(1) but also that the unit owners should be able to cancel any initial management contract not acceptable to 75% of them.

5. The Court overlooked that if 711.13(4) discloses no legislative prohibition against management contracts, it is equally clear that Chapter 711 in its entirety does not *ipso facto* validate such contracts. In

fact, the legislative history of this statute and § 2 of House Bill 4333 and its subsequent repeal demonstrates the intent of the legislature to give the people who will eventually own the units, ultimate control and afford relief from the abuses that have been perpetuated by overreaching developers. Chapter 70-273, House Bill No. 4333; Chapter 70-274, Senate Bill No. 157; Chapter 71-322, Senate Bill No. 752; and Chapter 71-277, Committee Substitute for Senate Bill No. 842.

6. This Court overlooked that F.S. § 711.13(4) is not at all consistent with a legislative intent to recognize long term, harsh management contracts or any agreement that could not be terminated by a 75% vote. This Court, in using § 711.13(4) as a shield to preserve the developers' unconscionable adhesion contracts overlooked the legislative intent to provide the unit owners with a sword to protect themselves therefrom.

7. The Court overlooked and failed to consider, that regardless of Chapter 711 F.S. the management contracts herein are void as a matter of well established corporate law in that a board of directors may not abdicate or delegate its total authority and power. 19 C.J.S. Corporations, § 756,758.

8. This Court's opinion hinges upon the determination that F.S. § 711.13(4) reveals no legislative prohibition against a management contract but this Court did not clearly state that the management contracts sub judice are cancellable thereunder by a 75% vote of the unit owners.

This enormous complex has 3,000 elderly people now locked into contracts that are harsh and will last

long beyond their lifetimes. In 1970, after this case had been decided in their favor, the legislature gave all unit owners an extra judicial remedy in similar situations.

Yet, if this ruling stands and F.S. §711.13(4) does not apply to Respondents — they will have been ousted of their judicial remedy and denied all other respite in violation of their rights to due process and equal protection under the United States and Florida Constitutions.

Respondents as CrossPetitioners, file this their Petition for Rehearing directed to this Court's opinion of 31 July 1973 and as grounds therefore would show:

1. That there is direct conflict between the opinion of the District Court of Appeal, Third District, and other Florida appellate decisions in the following respects:

a) The decision deprives the associations of their causes of action for breach of fiduciary duty in conflict with *Flight Engineering Corporation v. Shelton*, 103 So.2d 615 (Fla. 1958).

b) The decision misapplies the doctrine of election of remedies since different parties, different burdens of proof and inconsistent causes of action are involved and is thus in direct conflict with *Board of Public Instruction v. Mathis*, 132 Fla. 289, 181 So. 147 (1938) and *Mathews v. Mathews*, 133 So. 2d 91 (2nd D.C.A. Fla. 1961), and *Perry v. Benson*, 94 So.2d 819 (Fla. 1957).

c) The decision deprives the associations of their right to trial by jury in direct conflict with *Hightower v. Bigoney*, 156 So.2d 501 (Fla. 1963).

Wherefore Respondents and Cross-Petitioners pray that this Court will grant this Petition for Rehearing and determine:

1. That the District Court of Appeals, Third District's opinion as it relates to the invalidation of the onerous management agreements is not in conflict with the law of this State.

2. or in the alternative, clarify its opinion to adjudicate that respondents are entitled to relief under F.S. § 711.13(4); and

3. determine that this Court has conflict jurisdiction to determine the merits of Respondent's Cross-Petition for Certiorari, and grant the relief sought by Cross Petitioners.

Respectfully submitted,

FRATES FLOYD PEARSON STEWART
PROENZA & RICHMAN
Attorneys for Respondents
Twelfth Floor Concord Building
Miami, Florida 33130

By /s/ Bertha Claire Lee

WE HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing and Clarification was mailed this 14th day of August, 1973, to: McCARTHY STEEL HECTOR & DAVIS, Attorneys for Petitioner-Cross Respondent, 1414 First National Bank Building, Miami, Florida 33131.

By /s/ Bertha Claire Lee

IN THE SUPREME COURT OF FLORIDA

JULY TERM, A. D. 1973
WEDNESDAY, OCTOBER 3, 1973

CASE NO. 42,228

POINT EAST MANAGEMENT CORPORATION, A Florida corporation,

Petitioner, Cross-Respondent,

vs.

POINT EAST ONE CONDOMINIUM CORPORATION, INC., a Florida nonprofit corporation, et al., *Respondents, Cross-Petitioners.*

On consideration of the petition for rehearing filed by attorneys for respondents and the reply thereto,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

CARLTON, C.J., ADKINS, McCAIN and DEKLE, JJ., concur

ERVIN and BOYD, JJ., dissent

A True Copy

TEST:

Sid J. White
Clerk Supreme Court.

By: /s/ Ray D. Gent
Deputy Clerk

Y
CC: Frates, Floyd, Pearson,
Stewart, Proenza & Richman
McCarthy, Steel, Hector & Davis
(Hon. Darrey A. Davis)
Hon. W. P. Carter, Clerk
Becker & Poliakoff
(Hon. Alan S. Becker)

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SECY: bw
ATTY: r

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

CIVIL ACTION NO. 69-11434

(Judge James W. Kehoe)

POINT EAST ONE CONDOMINIUM CORPORATION, INC., POINT EAST TWO CONDOMINIUM CORPORATION, INC., POINT EAST THREE CONDOMINIUM CORPORATION, INC. and POINT EAST FOUR CONDOMINIUM CORPORATION, INC., Florida corporations not for profit,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

This cause came on to be heard upon motion of the defendant, Point East Management Corporation, a Florida corporation, for rehearing and reconsideration of the final judgment as to Count Five in Case No. 69-1143, and amendment to motion for rehearing, and plaintiffs' motion to strike alleging the unconstitutionality of Chapter 70-273, Laws of Florida. The Court has heard arguments of counsel, and being duly advised in the premises, it is therefore

ORDERED AND ADJUDGED as follows:

1. The Court does not pass upon the constitutionality of Chapter 70-273, Laws of Florida.

2. The defendant's motion for rehearing, and amendment thereto, is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 10 day of August, 1970.

/s/ JAMES W. KEHOE
CIRCUIT JUDGE.

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

(J. W. Kehoe)

CASE NO. 69-11434

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al, Florida corporations, not for profit,
Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,
Defendant.

(Consolidated)
CASE NO. 69-11436

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al, Florida corporations, not for profit,
Plaintiffs,

vs.

LEONARD SCHREIBER, LEONARD PEARL, MARCOS GESUNDHEIT and SIDNEY GORDON,
Defendants.

AMENDED ORDER

THIS CAUSE came on before the Court on plaintiffs' Petition for Rehearing as to Counts III and IV of Case No. 69-11434, and Count I of Case No. 69-11436, and plaintiffs' Motion to Strike defendants' amended Motion for Rehearing. The Court having considered the pleadings, memoranda of law, arguments of counsel, and being otherwise duly advised in the premises, its is

ORDERED AND ADJUDGED that plaintiffs' Motion for Rehearing be and the same is hereby denied.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiffs' Motion to Strike be and the same is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida this 8 day of September, 1970.

/s/ JAMES W. KEHOE
CIRCUIT JUDGE

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

Consolidated Cases Nos. 69-11434, 69-11435 and 69-11436

(Judge James W. Kehoe)

CASE NO. 69-11434

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

POINT EAST MANAGEMENT CORPORATION, a Florida corporation,

Defendant.

CASE NO. 69-11435

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

LEONARD SCHREIBER, et al.,

Defendants.

CASE NO. 69-11436

POINT EAST ONE CONDOMINIUM CORPORATION, INC., et al.,

Plaintiffs,

vs.

LEONARD SCHREIBER, et al.,

Defendants.

ORDER DENYING MOTION FOR REHEARING

The above styled consolidated cases came on to be heard upon plaintiffs' motion for rehearing on the order of dismissal entered herein on September 16, 1970. The Court has heard arguments of counsel, and being duly advised in the premises, it is thereupon.

ORDERED AND ADJUDGED that said motion for rehearing be and it is hereby denied.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 6 day of October, 1970.

/s/JAMES W. KEHOE
CIRCUIT JUDGE.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that three true and correct copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the State of Florida were mailed to DARREY A. DAVIS, ESQ., McCARTHY STEEL HECTOR & DAVIS, Attorneys for Respondents, 1414 First National Bank Building, Miami, Florida 33131 on the date of filing this Petition with the Court.

BY: /s/ JAMES D. LITTLE
JAMES D. LITTLE